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Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

AZEEZ P. ADEDUNTAN, M.D. and
VICTORY VASCULAR & GENERAL SURGERY OF GEORGIA, P.C.,

Petitioners

v.

HOSPITAL AUTHORITY OF CLARKE COUNTY D/B/A ATHENS REGIONAL MEDICAL CENTER, ET AL.

Respondents

On Petition For Writ Of Certiorari To The United States Court of Appeals for the Eleventh Circuit

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PETITION FOR WRIT OF CERTIORARI

LAWRENCE E. NEWLIN
Counsel of Record
JEFFREY N. SCHWARTZ
LAWRENCE E. NEWLIN & ASSOCIATES, P.C.
2394 Mt. Vernon Road, Suite 220
Atlanta, Georgia 30338
(678) 587-9000
Counsel for Petitioners

QUESTION PRESENTED FOR REVIEW

Whether an order is final pursuant to 28 U.S.C. §1291 under the "bright-line rule" articulated by this Court in Budinich v. Becton Dickinson & Co., 486 U.S. 196, 200, 108 S. Ct. 1717, 1721 (1988), when liability for attorney's fees pursuant to a prevailing party clause in a contract has already been found, and only the amount of fees remains pending in the trial court.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 29.6

Petitioners

Azeez P. Adeduntan, M.D.

Victory Vascular and General Surgery of Georgia, P.C.

No parent or publicly held company owns 10% or more of the stock of Petitioner Victory Vascular & General Surgery, P.C.

Respondents

Athens Regional Health Services, Inc.

Athens Regional Medical Center, Inc.

Athens Vascular Surgery, P.C.

Mark J. Costantino, M.D.

Hospital Authority of Clark County d/b/a Athens Regional Medical Center

David M. Sailors, M.D.

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PETITION FOR WRIT OF CERTIORARI

Petitioners, Azeez P. Adeduntan, M.D. ("Dr. Adeduntan") and Victory Vascular & General Surgery of Georgia, P.C. (collectively "Petitioners"), respectfully petition this Honorable Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit dismissing Petitioners' appeal as premature. See App. D.

OPINIONS BELOW

The district court granted summary judgment on August 25, 2005 in favor of Hospital Authority of Clark County d/b/a Athens Regional Medical Center, Athens Regional Medical Center, Inc., and Athens Regional Health Services, Inc. (collectively "ARMC Defendants") on Petitioners' claims. App. A. On July 11, 2006, the district court granted summary judgment in favor of the ARMC Defendants, and denied summary judgment to Dr. Adeduntan, on the ARMC Defendants' counterclaim for attorney's fees. App. B. By order dated September 21, 2006, the district court granted summary judgment in favor of the remaining defendants, Athens Vascular Surgery, P.C., David M. Sailors, M.D. and Mark J. Costantino, M.D. (collectively the "AVS Defendants"). App. C. The opinion of the Eleventh Circuit Court of Appeals dismissing Petitioners' appeal as premature is unpublished. App. D. The Eleventh Circuit entered an order denying a petition for rehearing en banc on November 14, 2007. App. E.

JURISDICTION

The Eleventh Circuit Court of Appeals entered its order dismissing Petitioners' appeal as premature on September 27, 2007. Petitioners sought rehearing en banc, and the Eleventh Circuit entered an order denying a petition for rehearing en banc on November 14, 2007. This Court has jurisdiction of this matter under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

This action was filed on July 1, 2004 by Petitioners against the ARMC Defendants and the AVS Defendants for Defendants' invidious discrimination and violation of Dr. Adeduntan's civil rights, and Defendants' conspiracy in restraint of trade and monopolization. The ARMC Defendants answered on August 30, 2004, and counterclaimed for defense costs and attorney's fees, pursuant to a fee-shifting provision in a document entitled "Applicant's Consent and Release" ("ACR")(App. F) executed by Dr. Adeduntan in connection with his appointments to the medical staff at Athens Regional Medical Center. The AVS Defendants answered on September 1, 2004.

The ARMC Defendants filed their Motion for Partial Summary Judgment on January 25, 2005, and a Second Motion for Summary Judgment on February 24, 2005. The AVS Defendants filed their own Motion for Partial Summary Judgment on March 9, 2005.

In its order of August 25, 2004, the district court granted summary judgment in favor of the

ARMC Defendants on all of Petitioners' claims, and granted partial summary judgment to the AVS Defendants on Petitioners' antitrust claims. App. A. On July 11, 2006, the district court granted summary judgment in favor of the ARMC Defendants, and denied summary judgment to Dr. Adeduntan on the ARMC Defendants' counterclaim. App. B. By order dated September 21, 2006, the district court granted summary judgment in favor of the AVS Defendants on Petitioners' remaining claims, and denied Petitioners' Motion to Remove Limitations on Discovery, Permit Discovery of Additional Peer Review Evidence, Permit Additional Depositions, and to Redepose Certain Witnesses ("Appellants' Additional Discovery Motion"). App. C. All substantive claims of the parties were disposed of following the entry of the district court's September 21, 2006 order. Petitioners timely filed their Notice of Appeal on October 13, 2006.

The district court's order of September 21, 2006 (App. C) resulted in the disposition of all remaining substantive issues in the case, and the only issue remaining for determination by the district court is the amount of costs and/or fees to which the ARMC Defendants are allegedly entitled under the fee-shifting provision in the ACR for defending this case in the district court. Attorney's fees are not requested for anything except defending this case. Petitioners contest any such entitlement, and the merits of their appeal address, *inter alia*, the error committed by the district court in holding in favor of the ARMC Defendants on the fee-shifting provision of the

ACR.

REASONS FOR GRANTING THE PETITION

A writ of certiorari is necessary because the Eleventh Circuit's panel decision of September 25, 2007 conflicts with the unanimous decision of the United States Supreme Court in Budinich v. Becton Dickinson & Co., 486 U.S. 196, 200, 108 S. Ct. 1717, 1721 (1988). Additionally, this proceeding involves a question of exceptional importance, as the Eleventh Circuit's decision conflicts with authoritative decisions entered by the majority of the other United States Circuit Courts of Appeal subsequent to the decision in Budinich and could deprive Appellants of any appeal at all.

Indeed, the Eleventh Circuit's decision of September 25, 2007 seemingly seeks guidance on this matter from this Court, stating the following:

> Therefore, MedPartners establishes the law of this circuit on the issue in the post-Budinich era. For better or for worse, whether wrong or right, MedPartners is binding panel precedent that we must follow until this Court sitting en banc, **or the Supreme Court, decides otherwise in a case that presents the contract-attorney's fees issue.** [internal citation omitted] . . . Until that happens, this appeal is controlled by MedPartners and Ierna. (emphasis added)

In Budinich, 486 U.S. at 202-203, 108 S. Ct. at 1722, this Court, in a unanimous opinion, set forth what it characterized as a bright-line rule, acknowledging that "Courts and litigants are best served by the bright-line rule, which accords with traditional understanding, that a decision on the merits is a 'final decision' for purposes of §1291 whether or not there remains for adjudication a request for attorney's fees attributable to the case." The Budinich Court further emphasized the practicality of that rule, as follows:

> This practical approach to the matter suggests that what is of importance here is not preservation of conceptual consistency in the status of a particular fee authorization as 'merits' or 'non-merits,' but rather preservation of operational consistency and predictability in the overall application of §1291. This requires, we think, a uniform rule that an unresolved issue of attorney's fees for the litigation question does not prevent judgment on the merits from being final.

Budinich, 486 U.S. at 202, 108 S. Ct. 1722. The Eleventh Circuit's decision in this case addresses whether or not the pronouncement of such a bright-line rule by this Court in Budinich was binding precedent or merely dicta. App. D.

As is acknowledged in the Eleventh Circuit's decision, there are certainly decisions of the Eleventh Circuit, which reaffirm the bright-line rule stated in Budinich. See, e.g., LaChance

v. Duffy's Draft House, Inc., 146 F.3rd 832, 837 (11th Cir. 1998)("Attorney's fees is always a collateral issue."); Fluor Constructors, Inc. v. Reich, 111 F.3rd 94, 96 (11th Cir. 1997)("Both the imposition and the amount of attorney's fees are always collateral to the merits of an action."). These are but two examples of other decisions of the Eleventh Circuit with the same adherence to the Budinich bright-line rule. See also, Atlas v. Dzikowski, 210 F.3rd 1305, 1307 (11th Cir. 2000)("We have interpreted *Budinich* as holding that "attorney's fees is always a collateral issue."); Golub v. J.W. Gant & Associates, 863 F.2d 1516, 1518 (11th Cir. 1989)("The question of our jurisdiction of this appeal has been authoritatively answered by *Budinich* . . . In *Budinich*, . . . the Court held that under federal law, which necessarily governs appealability under §1291, both the imposition and the amount of attorney's fees are always collateral to the merits of an action.").

The Eleventh Circuit's decision in this case is based upon two previous panel decisions of the Eleventh Circuit, one preceding and one following the decision of this Court in Budinich. In the preceding case, Ierna v. Arthur Murray Int'l., Inc., 833 F.2d 1472, 1475 (11th Cir. 1987), the panel rejected the bright-line rule followed by several circuits, including the Sixth, Eighth, Ninth, and Tenth Circuits, and instead found that "[w]hen the parties contractually provide for attorney's fees, the award is an integral part of the merits of the case." Ierna, 833 F.2d at 1476. In Ierna, the Court further held:

> Because the parties provided in their agreement for costs and expenses to be awarded to the prevailing party, the award is integral to the merits. The district court's order, therefore, did not become final and appealable until the court calculated the final award of costs and expenses to appellees as prevailing parties.

Id. at 1476.

The Eleventh Circuit decision in this matter acknowledges that Ierna pre-dated Budinich, such that it:

> [C]ould be argued that the holding of the Ierna decision was undermined by the sweeping language in the later decision of the Supreme Court in Budinich, even though that case did not squarely present the issue as to contractual attorney's fees.

The Eleventh Circuit's decision in this case then looks to one panel decision entered subsequent to Budinich, Brandon, Jones, Sandall, Zeide, Cohn, Chalal & Musso, P.A. v. MedPartners, Inc., 312 F.3d, 1349, 1355 (11th Cir. 2002), which states as follows:

> In this Circuit, a request for attorney's fees pursuant to a contractual clause is considered a substantive issue; and an order that leaves a substantive fees issue pending cannot be 'final.' [citing Ierna].

First, it should be noted that MedPartners actually articulated three reasons why the Eleventh Circuit concluded that the order appealed from was not "final." MedPartners 312 F.3d at 1355:

> The district court's order - - given the explicit retention of jurisdiction by the district court of the award of attorney's fees, the closing (instead of dismissing) of the case, and the absence of a separately-filed final judgment - - is no final order. We, therefore, lack jurisdiction over appeal No. 01-15929, MedPartners's appeal and Orthopedic Center's cross-appeal from district court case No. 99-8624.

Thus, along with its reliance upon the pre-Budinich decision in Ierna, MedPartners was also decided based upon factors beyond simply whether or not the claim for attorney's fees was premised upon a contract. Utilizing the Eleventh Circuit's dicta rationale in the instant matter, MedPartners was itself decided based upon the particular facts of that case, which do not all exist here, and MedPartners' purported rejection of the bright-line rule was fact based, and thus dicta to the extent different from the instant case.

The Eleventh Circuit's decision in this matter also conflicts with the precedents of the majority of the other Circuit Courts of Appeals. The alignment of the Circuit Courts of Appeals as to the bright-line rule outlined in Budinich has been set forth in several appellate decisions to

date, both before and after Budinich. See, e.g., Beckwith Machinery Company v. Travelers Indemnity Company, 815 F.2d 286, 288-289 (5th Cir. 1987); Justine Realty Company v. American National Can Company, 945 F.2d 1044, 1047, footnote 1 (8th Cir. 1991); In re: Michael Dale Yates, 2005 Bankr. LEXIS 8 (10th Cir. 2005).

Of significance is the Fifth Circuit's position, which found Budinich binding precedent requiring a deviation from its earlier approach to these issues. In Treuter v. Kaufman County, Texas, 864 F.2d 1139, 1142 (5th Cir. 1989), the Fifth Circuit noted that "[p]rior to the recent Supreme Court opinion in Budinich v. Becton Dickinson & Co., 486 U.S. 196, 200, 108 S. Ct. 1717, 100 L. Ed. 2d 178 (1988), the above inquiry would have been governed by the decision of this Court in Holmes v. J. Ray McDermott & Co., Inc., 682 F.2d 1143 (5th Cir. 1982)." In Trueter, the court went on to state, however, that, in Budinich, "the Supreme Court rejected the above rationale set forth by this Court in *Holmes* for determining whether 'a decision on the merits is a final decision' as a matter of federal law under §1291 when the recoverability or amount of attorney's fees for litigation remains to be determined." Trueter, 864 F.2d at 1143. This not only demonstrates that the Fifth Circuit has found Budinich to be binding precedent rather than merely dicta, but also shows that the Fifth Circuit has departed from the rule of law articulated in Holmes, supra. This is significant because the Eleventh Circuit decision in the instant matter relied upon Ierna for its decision, and the Ierna

court looked to Holmes, supra, as setting forth "[t]he test in the circuit," stating that:

> When attorney's fees are similar to costs or collateral to an action, a lack of determination as to the amount does not preclude the issuance of a final, appealable judgment on the merits. When, however, the attorney's fees are an integral part of the merits of the case and the scope of relief, they cannot be characterized as costs or as collateral in their determination as a part of any final, appealable judgment. [Citing Holmes, 682 F.2d at 1146, and Beckwith, supra](collecting Fifth and Eleventh Circuit cases applying the *Holmes* test).

Ierna, 833 F.2d at 1475.

To the extent the Fifth Circuit has now rejected the Holmes test in deference to the Budinich bright-line rule, such strongly supports a writ of certiorari. The Fifth Circuit now follows the bright-line rule of Budinich, even in situations where attorney's fees are sought under a contract. As stated in First Nationwide Bank v. Summer House Joint Venture, 902 F.2d 1197, 1199 (5th Cir. 1990):

> [I]t is clear from its sweeping language that *Budinich* establishes a 'bright-line' rule that applies with force where attorney's fees are sought under a *contract* . . . Certainly, the 'bright-line' rule announced in

> *Budinich* covers all attorney's fees, whether provided by statute or contract.

First Nationwide Bank, 902 F.2d at 1200.

Other circuits have taken the same approach, treating the Budinich bright-line rule, not as dicta, but as binding precedent. See McGuire v. Russell Miller Inc., 1 F.3d 1306, 1315 (2nd Cir. 1993)("*Budinich* supports the proposition that the amount of attorney's fees, even when awarded under a contract, is a post-judgment matter collateral to a decision on the merits."); Gnesys, Inc. v. Greene, 437 F.3d 482, 486 (6th Cir. 2005)("a determination as to whether a decision is 'final' should not turn upon the characterization of those fees by the statute or decision of law that authorizes them.'" (Citing Budinich, 486 U.S. at 201)). The Sixth Circuit in Gnesys, also emphasized the holding and the statement in Budinich that:

> [T]he time of appealability, having jurisdictional consequences, should above all be clear . . . Courts and litigants are best served by the bright-line rule . . . . The primary interest in these matters is to draw a clear line. The alternative would be unnecessary confusion for parties and the courts alike, with the outcome turning on whether attorney's fees in a particular case were deemed part of the 'merits.'

Gnesys, Inc. v. Greene, 437 F.3d at 487-88.

The Ninth Circuit found the distinction between fees authorized by law and those authorized by contract to be "a bit strained." Familian Northwest, Inc. v. RG&B Contractors, Inc., 21 F.3d 952, 954 (9th Cir. 1994). Familian Northwest argued that "fees authorized by contract are an exception" to Budinich, "which the Supreme Court failed to consider when issuing its broadly-worded decision." Id. at 955. The Ninth Circuit rejected that argument, however, also noting that the Seventh and Tenth Circuits had already rejected similar arguments in Continental Bank, N.A. v. Everett, 964 F.2d 701 (7th Cir. 1992), cert. denied, 506 U.S. 1035, 113 S. Ct. 816 (1992), and in Collard v. United States, 10 F.3rd 718 (10th Cir. 1993). Thus, the Ninth Circuit held that "attorney's fees are collateral whether they are authorized by law or by some other source." Familian Northwest, 21 F.3d at 955. In Familian, 21 F.3d at 955, the Ninth Circuit did note an Eighth Circuit decision, Justine Realty Company v. American National Can Company, 945 F.2d, 1044 (8th Cir. 1995), which distinguished Budinich as to the claims for attorney's fees which "arose prior to the litigation." Justine distinguished between fees provided by contract, which were "for the litigation," and those "incurred in pre-litigation performance of the contract, and thus part of the substance of the claim." Justine, 945 F.2d at 1047. Justine acknowledges, however, that Budinich ***is*** controlling as to attorney's fees "for the litigation," which are "not part of the merits," and which are therefore insufficient to preclude an appeal of an award as a final order. Justine, 945 F.2d at 1048-

49. The Ninth Circuit has affirmed the application of the bright-line rule adopted by this Court in Budinich, stating "unresolved issues related to attorneys' fees do not defeat finality, regardless of whether the attorneys' fees are available under a statute, **by contract,** or as a sanction for bad faith litigation. Knupfer v. Lindblade (In re Dyer), 322 F.3d 1178, 1186 (9th Cir. 2003). The fees at issue in the instant matter are only litigation fees incurred in defending this case.

While the majority of the Circuit Courts of Appeals have now followed the bright-line rule articulated in Budinich, in candor to this Court, it should be noted that the Fourth Circuit has deviated somewhat from the Budinich bright-line rule, based upon its interpretation of the post-Budinich amendments of Federal Rules of Civil Procedure 54 and 58. See Carolina Power and Light Company v. Dynegy Marketing and Trade, 415 F.3d 354, 357-362 (4th Cir. 2005). Interestingly, however, Carolina Power presents a divided legal analysis of the issue, because of the conflicts between the primary opinion of the Court, the concurring opinion, and the concurring and dissenting opinion. The primary opinion declines to follow Budinich in the context of a contract-based claim for attorney's fees, based upon the 1993 amendments to Federal Rules of Civil Procedure 54 and 58. In contrast, the concurring opinion of Judge Wilkinson notes that:

> My brother Widener indicates some displeasure with the unanimous *Budinich* decision, but, as inferior federal judges, we are hardly free to

> disregard it. Further, contrary to my good colleague's protestations, never allowing an immediate appeal could actually lead to wasteful litigation depending on the nature of the contractual provision. If the appellate court reverses the district court's determination as to who prevailed, the district court's attorneys' fees determination becomes unnecessary (if the contractual provision provided for fee shifting in more than one direction) or will have to be repeated (if the contractual provision provided for fee shifting in either direction) . . . . In sum, Judge Widener and I cannot agree more on the desirability of limiting litigation, but the hope that a never-collateral view of contractual fee provisions will actually achieve that goal seems to me illusory . . . . This need for clarity commends the holdings of our sister circuits - - that contractual attorneys' fees provisions are always collateral – in cases where the nature of a contractual attorneys' fee provision admits of any doubt. . . . In such cases, and indeed in all cases, any fee claim tied to the costs of the underlying litigation in a contractual dispute should be regarded as collateral.

Carolina Power and Light Company, 415 F.3d at

363-364. In the concurring and dissenting opinion, Judge Widener instead suggested following the rule of MedPartners, supra.

All litigants and attorneys appearing before the United States federal courts, including the litigants and attorneys in this case, need the uniformity offered by the bright-line rule set forth in Budinich. In this case, the Eleventh Circuit has decided this important issue of federal law in a way that conflicts with this Court's relevant decision in Budinich, and this issue should be settled by this Court to resolve the remaining conflicts between the circuits as to the precedential value of the Budinich bright-line rule.

The risk to litigants, such as Dr. Adeduntan here, is that should this Court clarify Budinich so as to deviate from the rule articulated in MedPartners, before there is an award of attorney's fees for Dr. Adeduntan to appeal, litigants such as Dr. Adeduntan will be left without any ability to appeal at all the merits of the case. Because the district court below already decided the liability for fees, and Dr. Adeduntan's appeal to the Eleventh Circuit timely filed pursuant to Budinich has already been dismissed as premature pursuant to MedPartners, any appeal after the award of attorney's fees will then be untimely, except as to the amount of fees awarded.

The bright-line rule is one which avoids pitfalls for both the wary and the unwary, and avoids multiple appeals being filed, dismissed, and refiled by careful lawyers simply because the attorney's fees are characterized as contractual

and not statutory in origin, given that the current position of the Eleventh Circuit on the issue facially appears to be in contravention of the position of this Court.

CONCLUSION

Based upon the foregoing, the Petitioners respectfully request that this Honorable Court grant the Petition for Writ of Certiorari.

Respectfully submitted,

/s/
Lawrence E. Newlin
Counsel for Petitioners

LAWRENCE E. NEWLIN & ASSOCIATES, P.C.
2394 Mt. Vernon Road
Suite 220
Atlanta, Georgia 30338
(678) 587-9000

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ATHENS DIVISION

AZEEZ P. ADEDUNTAN,
VICTORY VASCULAR & GENERAL
SURGERY OF GEORGIA, P.C.

Plaintiffs,

v. Case No. 3:04-CV-65 (CDL)

HOSPITAL AUTHORITY OF CLARKE
COUNTY d/b/a ATHENS REGIONAL
MEDICAL CENTER, ATHENS REGIONAL
MEDICAL CENTER, INC., ATHENS
REGIONAL HEALTH SERVICES, INC.,
ATHENS VASCULAR SURGERY, P.C.,
DAVID M. SAILORS, MARK J.
CONSTANTINO,

Defendants.

ORDER

I. INTRODUCTION

This lawsuit arises from the medical peer review of Plaintiff Dr. Azeez P. Adeduntan conducted after a patient of Dr. Adeduntan died at the Athens Regional Medical Center (ARMC). The peer review was allegedly conducted and directed by the

Defendants. Dr. Adeduntan, along with his professional corporation, Victory Vascular & General Surgery of Georgia, P.C., assert various federal and state claims based upon Defendants' peer review conduct. Those claims include federal civil rights claims pursuant to 42 U.S.C. §§ 1981, 1985, 1983, and Title VII; federal antitrust claims under the Sherman Act, 15 U.S.C. §§ 1, 2; and state law claims for the negligent and intentional infliction of emotional distress and for attorney's fees. Defendants have filed motions for summary judgment and partial summary judgment. Defendants Hospital Authority of Clarke County (doing business as Athens Regional Medical Center), Athens Regional Medical Center, Inc., and Athens Regional Health Services, Inc. (collectively referred to as the "ARMC Defendants") have moved for summary judgment as to all of Plaintiffs' claims based upon a release executed by Dr. Adeduntan. In addition to their release defense, the ARMC Defendants also contend that they are entitled to summary judgment on: (1) Dr. Adeduntan's Title VII claim because they were not his employer; (2) Plaintiffs' peer review related claims, excluding the federal civil rights claims,[1] based upon immunity under the Health Care Quality Improvement Act (HCQIA), 42 U.S.C. § 11111, et seq.; and (3) Plaintiffs' antitrust claims based upon Plaintiffs' alleged lack of standing to assert those claims.

Defendants Athens Vascular Surgery, P.C., Dr. David M. Sailors, and Dr. Mark J. Costantino (collectively referred to as the "Athens Vascular Defendants") seek partial summary judgment as to

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[1]The HCQIA expressly excludes federal civil rights claims from its immunity provisions. 42 U.S.C. § 11111(a)(1).

Plaintiffs' peer review related claims, except for Plaintiffs' federal civil rights claims, based upon immunity under the HCQIA. The Athens Vascular Defendants also seek summary judgment on Plaintiffs' antitrust claims based upon Plaintiffs' lack of standing.

Having reviewed the motions and responses and having heard oral argument on the motions, the Court grants summary judgment in favor of the ARMC Defendants as to all of Plaintiffs' claims and grants partial summary judgment to the Athens Vascular Defendants as to Plaintiffs' antitrust claims against them. The Court defers ruling on the Athens Vascular Defendants' Motion for Summary Judgment as to Plaintiffs' peer review related claims based upon HCQIA immunity until Plaintiffs are provided with the opportunity to conduct additional limited discovery regarding Defendants' peer review of Dr. Adeduntan.[2]

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[2]To overcome Defendants' immunity defense and to prove their federal discrimination claims, Plaintiffs contend that they need to review peer review materials. Defendants take the position that those materials are protected by the Georgia peer review privilege and are not subject to discovery. The ARMC Defendants, who have custody and control of the peer review materials, have filed a Motion for Protective Order, and therefore, those materials have not been produced to Plaintiffs. In light of the Court's grant of summary judgment to the ARMC Defendants and the fact that the Athens Vascular Defendants do not seek summary judgment as to Plaintiffs' federal discrimination claims, a question exists as to whether the peer review privilege issue, which had been presented by the ARMC Defendants in their motion for a protective order, is now necessary to resolve. The Court, as explained in further detail in this Order, finds that the issue must be decided since it is relevant to the Athens Vascular Defendants' summary judgment motion

II. BACKGROUND

Dr. Adeduntan is a physician and surgeon with his own professional medical practice, Victory Vascular & General Surgery of Georgia, P.C., in Athens, Georgia. Dr. Adeduntan is black; his national origin is Nigerian. He first applied for and was granted medical staff privileges at ARMC, a local hospital, on August 28, 1996. These privileges allowed Dr. Adeduntan to admit and treat his patients in the hospital, so that ARMC could provide care for those patients during their stays. Dr. Adeduntan also maintained medical staff privileges at other Athens area hospitals, including St. Mary's Hospital.

ARMC requires that surgeons reapply for medical staff privileges on a regular basis. Dr. Adeduntan did as required, and his privileges were renewed on four separate occasions. In February 2002, Dr. Adeduntan performed an emergency abdominal aortic aneurysm (AAA) surgery in ARMC's operating room. The patient did not survive; the ARMC Defendants state that the patient died during the procedure, while Dr. Adeduntan contends that the patient was "clinically dead" before he was ever contacted for surgery.

Afterwards, ARMC's Surgical Case Review Committee conducted a peer review of the procedure and recommended to the credentialing committee that Dr. Adeduntan complete a continuing education course or arrange for a local proctor before performing the

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based upon HCQIA immunity and because those peer review materials are relevant to Plaintiffs' federal discrimination claims against the Athens Vascular Defendants, for which no summary judgment motion has been filed.

same procedure again at ARMC. Dr. Adeduntan appealed this recommendation and agreed to refrain from performing the procedure while the matter was unresolved. He still maintained all other medical staff privileges at ARMC at that time.[3]

On September 3 and October 6, 2003, Dr. Adeduntan filed two charges of discrimination with the EEOC regarding ARMC's peer review process.[4] Dr. Adeduntan applied for reappointment to the medical staff at ARMC on March 24, 2003, and ARMC granted him a six-month extension pending resolution of the peer review process on April 23, 2003. A second extension was granted in October 2003. On February 9, 2004, Dr. Adeduntan and the ARMC Defendants executed a Peer Review Resolution Agreement (PRRA), intended to encompass all issues and claims related to the peer review process. Dr. Adeduntan's privileges lapsed at the end of April 2004.[5] He

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[3]It appears that until April 30, 2004, when all of his staff privileges lapsed, Dr. Adeduntan maintained all privileges except for permission to perform AAA surgeries.

[4]The first charge of discrimination alleged that Dr. Adeduntan was subjected to peer review, had limited hospital privileges, and faced future loss of his hospital privileges because of his race and national origin. His second charge stated that he was subject to retaliation for filing the first charge.

[5]The ARMC Defendants state that Dr. Adeduntan's privileges lapsed because his application to renew them was incomplete in three ways: (1) he did not provide an appropriate written opinion from Dr. Vittimberga in accordance with the PRRA (discussed in more detail infra); (2) the reference from St. Mary's Hospital was not timely received; and (3) the reference from Elberton Hospital was never received.

commenced this proceeding on July 1, 2004.

III. SUMMARY JUDGMENT STANDARD

Federal Rule of Civil Procedure 56(c) provides that summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

An issue of fact is "material" if, under the applicable substantive law, it might affect the outcome of the case. *Allen v. Tyson Foods*, 121 F.3d 642, 646 (11th Cir. 1997). An issue of fact is "genuine" if the record taken as a whole could lead a rational trier of fact to find for the nonmoving party. *Id.* A court must decide "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251 (1986).

The moving party bears "the initial responsibility of informing the . . . court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Where the nonmoving party bears the burden of proof at trial, the moving party may discharge this "initial responsibility" by showing that there is an absence of evidence to support the nonmoving party's case or by showing that the

nonmoving party will be unable to prove its case at trial. *United States v. Four Parcels of Real Property*, 941 F.2d 1428, 1437-38 (11th Cir. 1991). To survive summary judgment, the nonmoving party bearing the ultimate burden of proof at trial must come forward with evidence sufficient to withstand a directed verdict motion. *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1116 (11th Cir. 1993).

On summary judgment, "the evidence of the non-movant is to be believed." *Anderson*, 477 U.S. at 255. "The district court should resolve all reasonable doubts about the facts in favor of the nonmovant, and draw all justifiable inferences . . . in his favor." *Four Parcels*, 941 F.2d at 1437 (internal quotations and citations omitted).

IV. DISCUSSION

A. The ARMC Defendants and the PRRA Release

Dr. Adeduntan and the ARMC Defendants entered into the PRRA as a means of resolving the peer review process without resorting to a formal medical staff hearing. The PRRA acknowledges that Dr. Adeduntan had voluntarily discontinued performing AAA procedures during the peer review process and set forth the recommendation of the credentialing committee to which Dr. Adeduntan had objected (namely, that he receive additional instruction in performing the procedure or arrange for local proctoring). The substantive terms of the agreement set forth that

> Based upon direct observation of Dr. Adeduntan performing AAA procedure(s) (exact number to be determined by Dr. Vittimberga, but more than one), Dr. Vittimberga will provide a written opinion to

the Credentials Committee that Dr. Adeduntan has the requisite clinical skills to perform the AAA procedure consistent with the standard of care. Further, Dr. Adeduntan agrees to a retrospective review of his next five (5) AAA surgeries at ARMC.

The Credentials Committee will deem Dr. Vittimberga's opinion and certification as sufficient evidence of Dr. Adeduntan's competence and qualification in performing AAA procedures, and his agreement to refrain from performing AAA surgery will no longer be necessary. In the event Dr. Vittimberga fails to certify Dr. Adeduntan's competence and qualifications in performing these procedures, this matter will be referred back to the Credentials Committee for consideration, with input, as requested, from Dr. Adeduntan and Dr. Vittimberga.

The release of the PRRA provided that

Each party hereto unconditionally releases, remises, discharges, and acquits the other party from each, every, and all claims, both in law and in equity, and all expenses, debts, covenants, liabilities, or responsibilities in any way relating to or arising from said claims, which either party had or now has against the other party, whether known or unknown, and whether foreseen or unforeseen arising from, or in any way connected directly or indirectly with, or otherwise related to the peer review investigation of Case No. 10-63-13 and the hearing regarding the same. The release of ARMC is limited only to ARMC, Athens

> Regional Health Services, Inc., Athens Regional Medical Center, Inc., Hospital Authority of Clarke County, Georgia, Athens Regional Foundation, Inc., Athens Regional Health Resources, Inc., Athens Area Health Plan Select, Inc., Athens Regional Physician Services, Inc., Regional FirstCare, Inc., Athens Regional Health Ventures, Inc., Athens Area Health Plan Governance Committee and Athens Regional Home Health.
>
> . . .
>
> Dr. Adeduntan further acknowledges and agrees that with respect to the rights and claims he is waiving, to [sic] he is not only waiving his right to recover money or any other relief in any action he might commence, but also his right to file and recover in any action brought on his behalf against ARMC by any other party, including, but not limited to the United States Equal Employment Opportunity Commission or any other federal, state or local government agency or department.
>
> ARMC and Dr. Adeduntan expressly agree that this release does not preclude Dr. Adeduntan from bringing any and all claims, demands, rights, causes of action and/or seeking evidence arising out of any other matter or against any other party, including, but not limited to, any claims, demands, rights, or causes of action that are presently pending in the State Court of Clarke County.

The ARMC Defendants contend that this release bars all of Plaintiffs' claims arising out of the peer review

process before February 9, 2004, the effective date of the PRRA. In response, Plaintiffs argue that the PRRA is unenforceable as a whole because the agreement lacks consideration or, in the alternative, the release is unenforceable because the ARMC Defendants materially breached the terms of the agreement.

1. Enforceability of Release

a. Consideration

The Court finds Plaintiffs' argument that the agreement lacks consideration to be without merit. If Dr. Adeduntan complied with the conditions set forth in the agreement, the ARMC Defendants agreed to reinstate his privileges in full and to discontinue any further peer review process. The PRRA also provides that any individual or entity inquiring into Dr. Adeduntan's standing at ARMC would be informed that he had no pending disciplinary actions and that he maintained privileges in good standing. The PRRA also contained a mutual release of claims arising from the peer review process. The agreement therefore was supported by more than adequate consideration.

b. Breach of Contract

Plaintiffs contend that the ARMC Defendants breached the terms of the PRRA, rendering any release of claims contained in the agreement unenforceable. The breach occurred, according to Plaintiffs, when ARMC refused to accept the written opinion of Dr. Vittimberga certifying Dr. Adeduntan's competence. In response, the ARMC Defendants contend that the written opinion of Dr. Vittimberga did not comply with the terms of the PRRA.

Plaintiffs' allegation of breach of contract requires a review of additional facts regarding the procurement of Dr. Vittimberga's written opinion.

After entering into the PRRA, Dr. Adeduntan sent a letter to Dr. Vittimberga dated March 8, 2004, requesting that Dr. Vittimberga send a letter to ARMC regarding Dr. Adeduntan's qualifications to perform the AAA procedure. Dr. Adeduntan essentially dictated the letter's content to Dr. Vittimberga, instructing that it should read: "'Based on direct observations; I hereby certify that Dr. Azeez Adeduntan; is a well trained Surgeon who is highly qualified & competent in performing Abdominal Aortic Aneurysms (AAA) procedures consistent with the standard of Care.'"[6] On March 17, 2004, Dr. Vittimberga sent a one-sentence letter to ARMC containing language that was nearly the verbatim language requested by Dr. Adeduntan. Dr. Vittemberga included with his letter a copy of Dr. Adeduntan's March 8 letter to him.

Dr. Cecil Hudson, Chief Medical Officer at ARMC, contacted Dr. Vittimberga to follow up on the letters he received. When asked the date of his observation of Dr. Adeduntan's performance of AAA procedures, Dr. Vittimberga responded that he had observed Dr. Adeduntan performing the procedure eight years prior, while Dr. Adeduntan was in a training program for residents and fellows in vascular surgery under Dr. Vittimberga's supervision. This additional information led Dr. Hudson to subsequently inform Dr. Adeduntan that the written opinion of Dr. Vittimberga did not satisfy the requirement of direct observation in the PRRA.

The issue for the Court is the meaning of the direct observation requirement in the PRRA. The starting point in contract construction under Georgia law is "to look at the four corners of the instrument to

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[6] Punctuation and capitalization as in original.

determine the intention of the parties from the language employed." *Livoti v. Aycock*, 263 Ga. App. 897, 901-02, 590 S.E.2d 159, 164 (2003). In making this determination, "all the attendant and surrounding circumstances may be proved, but not explained." Id.; see also O.C.G.A. § 13-2-3. If the language of the agreement is "'clear, unambiguous, and capable of only one reasonable interpretation, no construction is necessary or even permissible by the court.'" *Estate of Sam Farkas, Inc. v. Clark*, 238 Ga. App. 115, 119-20, 517 S.E.2d 826, 830 (1999) (quoting *Reahard v. Ivester*, 188 Ga. App. 17, 19, 371 S.E.2d 905, 907 (1988)). An "'[a]mbiguity in a contract is defined as duplicity, indistinctness, or an uncertainty of meaning or expression.'" *Thomas v. B&I Lending, LLC*, 261 Ga. App. 39, 41, 581 S.E.2d 631, 634 (2003). "[A] mere lack of clarity on casual reading is not the criterion for determining whether a contract is afflicted with ambiguity." *McCann v. Glynn Lumber Co.*, 199 Ga. 669, 679, 34 S.E.2d 839, 845 (1945).

Plaintiffs assert that the language of the PRRA is silent as to whether the direct observation requirement is prospective or retrospective, so that Dr. Vittimberga's previous observation of Dr. Adeduntan satisfies its terms.[7] The plain language of the PRRA

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[7]Plaintiffs' logic is inconsistent with the law in that they seem to argue that because the direct observation requirement was ambiguous as to whether it was prospective or retrospective in nature, they have satisfied the requirement by fulfilling it according to their interpretation. Under Georgia law, if an ambiguity exists in an agreement, the court should attempt to resolve the ambiguity by applying the statutory rules of contract construction. *Atlanta Dev., Inc. v. Emerald Capital*, 258 Ga. App. 472, 476, 574 S.E.2d 585, 589 (2002). If the ambiguity cannot be negated by applying the rules of

does not support Plaintiffs' argument. The language of the agreement is in the present tense and written in a way that contemplates future action: the number of procedures observed is "to be determined" by Dr. Vittimberga; Dr. Vittimberga is to determine whether Dr. Adeduntan "has" the competency to perform AAA procedures. The language regarding the number of procedures to be observed by Dr. Vittimberga is particularly awkward when attempting to interpret it in Plaintiffs' suggested manner; the provision that the number of procedures observed is "to be determined by Dr. Vittimberga" is rendered meaningless if viewed retrospectively, considering that Dr. Vittimberga has apparently already observed Dr. Adeduntan perform a finite number of AAA procedures under his previous supervision. Plaintiffs' interpretation of the language of the direct observation requirement is tortured and overreaching. The clear and unambiguous language of the agreement clearly evinces the parties' intention that the direct observation requirement is prospective in nature, and the Court finds that it is the only reasonable interpretation of that provision.

For that reason, Plaintiffs have not demonstrated that Defendants breached the terms of the PRRA, nor have they offered any other legal basis supporting their contention that the PRRA is not enforceable. The Court finds as a matter of law that the release contained in the PRRA is enforceable. The next issue is whether Plaintiffs released the claims that they

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construction, then parol evidence may be introduced, and the issue of what was intended by the parties is a matter for a jury to decide. *Livoti*, 263 Ga. App. at 903, 590 S.E.2d at 164. Simply establishing that an ambiguity exists does not mean that Plaintiffs' interpretation must prevail.

assert in this lawsuit.

2. Scope of Release

Plaintiffs have asserted federal claims against the ARMC Defendants under 42 U.S.C. §§ 1981, 1983, and 1985; Title VII; and the Sherman Act. The Court finds, that according to the terms of the release, it encompasses all of Plaintiffs' claims in this suit:

> Each party hereto unconditionally releases, remises, discharges, and acquits the other party from each, every, and all claims, both in law and in equity, and all expenses, debts, covenants, liabilities, or responsibilities in any way relating to or arising from said claims, which either party had or now has against the other party, whether known or unknown, and whether foreseen or unforeseen arising from, or in any way connected directly or indirectly with, or otherwise related to the peer review investigation of Case No. 10-63-13 and the hearing regarding the same.

All of the federal claims Plaintiffs have asserted are related to the peer review process. Moreover, since Plaintiffs' state law claims of negligent and intentional infliction of emotional distress arise from the peer review process, they are also covered by the release in the PRRA.

During the hearing on Defendants' motion, Plaintiffs attempted to identify other instances of discriminatory conduct that occurred outside the peer review process, giving rise to independent and discrete causes of action. Plaintiffs stated that the ARMC Defendants: (1) sent the police to Dr. Adeduntan's home on one occasion; (2) encouraged an employee to file a sexual harassment complaint against Dr.

Adeduntan; (3) sent Dr. Adeduntan more uninsured patients than other doctors; (4) referred a patient complaint to the State Medical Board rather than handling it internally; (5) posted a confidential letter written by Dr. Adeduntan in the doctors' lounge; (6) made unnecessary chart reviews of Dr. Adeduntan's cases; and (7) placed observers in the operating room.

While these alleged acts may be probative of Dr. Adeduntan's clearly asserted discrimination claims, Plaintiffs have failed to demonstrate that each separate instance of conduct alleged is actionable. First, Plaintiffs failed to allege specifically in their Complaint any facts relating to the complaint of alleged sexual harassment against Dr. Adeduntan; the inclusion of observers in Dr. Adeduntan's operating room; or the excessive review of Dr. Adeduntan's patient charts. Plaintiffs may not amend their Complaint "through argument . . . opposing summary judgment." *Gilmour v. Gates, McDonald & Co.*, 382 F.3d 1312, 1315 (11th Cir. 2004). The remaining incidents, which were raised by Plaintiffs in the Complaint, either do not constitute actionable discriminatory conduct or are part of the peer review process and covered by the PRRA.

Because all of Plaintiffs' viable claims against the ARMC Defendants are encompassed and therefore barred by the release in the PRRA, the Court grants summary judgment to the ARMC Defendants on all of Plaintiffs' federal and state law claims.[8]

B. Antitrust Claims

Plaintiffs have brought a private suit for alleged

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[8]In light of this ruling, it is unnecessary to address the ARMC Defendants' Motion for Partial Summary Judgment on Dr. Adeduntan's Title VII claim based upon their contention that they were not his employer.

restraint of trade and monopoly under the federal antitrust statutes against the ARMC Defendants and the Athens Vascular Defendants.[9] The Sherman Act declares "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States . . . to be illegal," 15 U.S.C. § 1, and also prohibits the monopoly of, "or attempt to monopolize, or combine and conspire with any other person or persons, to monopolize any part of trade or commerce among the several States. . . ." 15 U.S.C. § 2. Private enforcement suits for damages caused by violations of the Sherman Act are permitted under the Clayton Act, 15 U.S.C. § 15. The Clayton Act allows successful plaintiffs to recover treble damages. *Id.*

Defendants argue that they are entitled to summary judgment on Plaintiffs' antitrust claims because Plaintiffs do not have legal standing to assert those claims. Standing under the Clayton Act has been described by the Eleventh Circuit "as a search for the proper plaintiff to enforce the antitrust law." *Todorov v. DCH Healthcare Auth.*, 921 F.2d 1438, 1448 (11th Cir. 1991). As a result, the courts have developed a two-step inquiry to evaluate whether a plaintiff has antitrust

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[9]The only remaining antitrust claims are those asserted against the Athens Vascular Defendants. The release in the PRRA bars Plaintiffs' antitrust claims against the ARMC Defendants. The Court notes that Defendant Hospital Authority of Athens-Clarke County is not in any event subject to Plaintiffs' antitrust claims as an instrumentality, agency, or political subdivision of Athens-Clarke County, which Plaintiffs concede in their Complaint. (Compl. at ¶¶64, 69.) Even if the PRRA did not operate to bar Plaintiffs' antitrust claims against the ARMC Defendants, they would still be entitled to summary judgment for the reasons stated herein.

standing: (1) "a court should determine whether the plaintiff suffered 'antitrust injury'"; and then, (2) "the court should determine whether the plaintiff is an efficient enforcer of the antitrust laws." Id. at 1449.

> An antitrust injury has been defined by the Supreme Court as injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. It should, in short, be "the type of loss that the claimed violations . . . would be likely to cause."

Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977)(quoting Zenith Radio Corp. v. Hazeltine Research, 395 U.S. 100, 125 (1969)). This "'requires the antitrust plaintiff to show that his own injury coincides with the public detriment tending to result from the alleged violation . . . increas[ing] the likelihood that public and private enforcement of the antitrust laws will further the same goal of increased competition.'" Todorov, 921 F.2d at 1450 (quoting Austin v. Blue Cross & Blue Shield of Ala., 903 F.2d 1385, 1389 (11th Cir. 1990)).

Plaintiffs allege in their Complaint that the Defendants "have conspired to impose and have imposed an unreasonable restraint on the vascular surgery market in and around Athens-Clarke County, Georgia" and "have engaged in predatory or anticompetitive conduct with the specific intent to monopolize the Athens-Clarke County area vascular surgery market." The effect of this conduct, Plaintiffs allege, has been economic injury caused by the Defendants' attempt to drive Plaintiffs out of the

vascular surgery market.

In *Todorov*, the Eleventh Circuit denied antitrust standing to a physician who did not receive the staff privileges he requested because it found that the doctor had shown only that he had been deprived of "the profits he would have garnered had he been able to share a part of the . . . supercompetitive, or monopoly, profits." Id. at 1453-54. This injury clearly did not fall within the definition of an antitrust injury because "the antitrust laws were not enacted to permit one person to profit from the anticompetitive behavior of another." *Id.* at 1454.

The type of harm complained of by Plaintiffs in this case is of the type deemed insufficient for antitrust standing in *Todorov*. As the Supreme Court has noted, the legislative intent behind the antitrust statutes was "the protection of competition, not competitors." *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962). The harm alleged in the Complaint is harm to the individual doctor, not to competition within the marketplace. The aim of the Sherman Act "'is not to protect businesses from the working of the market; it is to protect the public from the failure of the market.'"[10]

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[10]The Athens Vascular Defendants also provide numerous citations to cases outside the Eleventh Circuit that have similarly found that denial of a doctor's hospital privileges does not satisfy the requirement of antitrust injury. *See, e.g., Patel v. Midland Mem'l Hosp. & Med. Ctr.*, 298 F.3d 333, 346 (5th Cir. 2002) (finding suspension of privileges at one hospital did not eliminate plaintiff as competitor when he continued to treat patients at another facility); *BCB Anesthesia Care, Ltd. v. Passavant Mem'l Area Hosp. Ass'n*, 36 F.3d 664, 667, 668-69 (7th Cir. 1994) (holding anesthetists failed to show impact on competition, rather than themselves and also collecting federal cases that have reached same conclusion on antitrust claims); *Austin v. McNamara*, 979 F.2d 728, 739 (9th Cir. 1992) (noting that "[e]ven 'the *elimination*

Spanish Broad. Sys. of Fla., Inc. v. Clear Channel Communications, Inc., 376 F.3d 1065, 1069 (11th Cir. 2004)(quoting *Spectrum Sports, Inc. v. McQuillian*, 506 U.S. 447, 459 (1993)). For that reason, "'the law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself.'" *Id.* Plaintiffs have failed to demonstrate that they have suffered the type of antitrust injury contemplated under the Sherman Act.

Even if Plaintiffs were able to establish that they suffered antitrust injury, they still must demonstrate that they are efficient enforcers of the antitrust laws. This analysis requires consideration of several factors "that might be useful in determining whether a party is a proper plaintiff in a particular [antitrust] suit." *Todorov*, 921 F.2d at 1451. These factors include: (1) the directness of the injury and whether there "exists an identifiable class of persons whose self-interest would motivate them to vindicate the public interest in antitrust enforcement"; (2) the nature of the damages; (3) the importance of avoiding duplicative recoveries; and (4) whether the plaintiff can enforce an antitrust judgment efficiently and effectively. *Id.* at 1451-52. Considering those factors, Plaintiffs are not appropriate enforcers. All of Plaintiffs' allegations relate to the economic harm suffered by Plaintiffs, and there are no allegations regarding the effect of the alleged anticompetitive behavior on the consumers in the market. Parties who "have a stronger interest in ensuring that prices and

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of a single competitor, standing alone, does not prove anticompetitive effect. . . . [I]njury to competition, *beyond the impact on the claimant*'" is required).

services remain at competitive levels" are the appropriate enforcers of antitrust laws. *Robles*, 785 F. Supp. at 999. Plaintiffs' interest "is that [they] be allowed to compete . . . not that patients receive quality services at competitive prices."[11] *Id.*

Plaintiffs have therefore failed to show that they meet either prong of the two-step inquiry into antitrust standing. Because they lack antitrust standing, the Court grants summary judgment in favor of the Athens Vascular Defendants as to Plaintiffs' antitrust claims.

C. HCQIA Immunity

The Athens Vascular Defendants seek summary judgment as to Plaintiffs' state law claims based upon HCQIA immunity. Individuals associated with a medical "professional review action"—including a professional review body, members or staff of the body, persons under contract with the body, and persons who participate or assist with the review action—are entitled to immunity from damages under

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[11]Plaintiffs note that St. Mary's Hospital, where Dr. Adeduntan also maintains privileges, lacks open heart and dedicated angioplasty facilities. Although these are not facilities needed for Dr. Adeduntan to perform his surgeries, Plaintiffs submit that they may be needed for some of his patients, who often suffer from heart-related problems. Plaintiffs contend that the limited facilities at St. Mary's therefore impact Dr. Adeduntan's ability to treat patients there because patients may require a transfer from St. Mary's to ARMC, resulting in financial impact on those patients. However, the Court finds that this connection between vascular surgery and cardiac procedures is still insufficient to establish antitrust injury to the competition for vascular surgery in the Athens- Clarke area.

federal and state law under the HCQIA.[12] 42 U.S.C. § 11101(a). A "professional review action" is defined as:

> [A]n action or recommendation of a professional review body . . . which is based on the competence or professional conduct of an individual physician (which conduct affects or could affect adversely the health or welfare of a patient or patients) and which affects (or may affect) adversely the clinical privileges, or membership in a professional society, of the physician. Such term includes a formal decision of a professional review body not to take an action or make a recommendation . . . and also includes professional review activities relating to a professional review action.

42 U.S.C. § 11151(9).

If the action at issue meets this definition, the HCQIA also sets forth precise standards for such actions that must be fulfilled for the immunity provision to apply. For immunity to apply, the review action must have been pursued:

> (1) in the reasonable belief that the action was in furtherance of quality health care, (2) after a reasonable effort to obtain the facts of the matter, (3) after adequate notice and

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[12]The statute excludes civil rights actions brought under state or federal law. 42 U.S.C. § 11111(a)(1). Accordingly, the immunity sought would apply to Plaintiffs' antitrust claims–which the Court has already disposed of on other grounds–and their state law claims of intentional infliction of emotional distress and negligent infliction of emotional distress.

> hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances, and (4) in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after meeting the requirement of paragraph (3).

42 U.S.C. § 11112(a). A professional review action is presumed to have met these standards, but the presumption is rebuttable by a preponderance of the evidence. *Id.* The standard for resolving this issue at summary judgment is therefore: "'Might a reasonable jury, viewing the facts in the best light for [the plaintiff], conclude that he has shown, by a preponderance of the evidence, that the defendants' actions are outside the scope of § 11112(a)?'" *Bryan v. James E. Holmes Reg'l Med. Ctr.*, 33 F.3d 1318, 1333 (11th Cir. 1994)(quoting *Austin v. McNamara*, 979 F.2d 728, 735 (9th Cir. 1992)).

It is clear that the peer review process undertaken by ARMC of Dr. Adeduntan fits within the statutory definition of a professional review action. However, Plaintiffs have been denied a full opportunity to rebut the presumption of immunity because they have been denied access to the peer review materials that may show that Defendants' actions were outside the scope of activity protected by HCQIA immunity.[13] The Athens Vascular Defendants seek to invoke a federal law peer review immunity defense while at the

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[13]As noted previously, the ARMC Defendants have refused to produce any peer review materials based upon their contention that such materials are not discoverable because of the Georgia peer review privilege.

same time indirectly finding refuge in a state law peer review privilege asserted by a fellow Defendant that has the effect of denying Plaintiffs the opportunity to rebut the immunity defense. The Court therefore must determine whether the peer review materials sought by Plaintiffs are protected from discovery under federal law based upon Georgia's peer review statute. If they are privileged and thus not discoverable, then no evidence exists (and none would be forthcoming) to rebut the HCQIA immunity defense, and the Athens Vascular Defendants would be entitled to summary judgment. However, if those materials are not privileged, then Plaintiffs should be given the opportunity to conduct limited discovery regarding those materials before being subjected to summary judgment.

1. Georgia's Peer Review/Medical Review Committee Privileges

Georgia has codified its peer review and medical review privileges. O.C.G.A. §§ 31-7-133, 31-7-143. The peer review statute provides that

> [T]he proceedings and records of a review organization shall be held in confidence and shall not be subject to discovery or introduction into evidence in any civil action; and no person who was in attendance at a meeting of such organization shall be permitted or required to testify in any such civil action as to any evidence or other matters produced or presented during the proceedings or activities of such organization or as to any findings, recommendations, evaluations, opinions, or other actions of such organization or any members thereof. The confidentiality

> provisions of this article shall also apply to any proceedings, records, actions, activities, evidence, findings, recommendations, evaluations, opinions, data, or other information shared between review organizations who are performing a peer review function or disclosed to a government agency as required by law. However, information, documents, or records otherwise available from original sources are not to be construed as immune from discovery or use in any such civil action merely because they were presented during proceedings of such organization, nor should any person who testifies before such organization or who is a member of such organization be prevented from testifying as to matters within the person's knowledge; but such witness cannot be asked about such witness's testimony before such organization or about opinions formed by such witness as a result of organization hearings.

O.C.G.A. § 31-7-133. The language of O.C.G.A. § 31-7-143 is substantially the same, substituting "medical review committee" for peer review organization. At least one federal district court within Georgia has described the effect of the peer review statutes as "confer[ring] upon peer review organizations the qualities of a black hole; what goes in does not come out, and, unless the information exists in duplicate in the surrounding orbit, nothing that went in is discoverable." *Doe v. UNUM Life Ins. Co. of Am.*, 891 F. Supp. 607, 610 (N.D. Ga. 1995). The Georgia Supreme Court has recognized that in enacting these statutes, "the General Assembly has placed an absolute

embargo upon the discovery and use of all proceedings, records, findings, and recommendations of peer review groups and medical review committees in civil litigation." *Emory Clinic v. Houston*, 258 Ga. 434, 434-35, 369 S.E.2d 913, 913 (1988)(per curiam).

Defendants urge the Court to adopt this state law privilege and apply it in this case pursuant to Rule 501 of the Federal Rules of Evidence. Rule 501 sets forth the rules of evidentiary privilege as they are applied in federal court, providing that

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege . . . shall be determined in accordance with State law.

Fed. R. Evid. 501. The rule "clearly provides federal courts with the statutory power to recognize new or 'novel' evidentiary privileges." *In re Int'l Horizons, Inc.*, 689 F.2d 996, 1003 (11th Cir. 1982). However, courts do not "create and apply an evidentiary privilege unless it 'promotes sufficiently important interests to outweigh the need for probative evidence.'" *Univ. of Pa. v. EEOC*, 493 U.S. 182, 189 (1990)(quoting *Trammel v. United States*, 445 U.S. 40, 51 (1980)).

"Peer review, the process by which physicians

and hospitals evaluate and discipline staff doctors, has become an integral component of the health care system in the United States." *Bryan v. James E. Holmes Reg'l Med. Ctr.*, 33 F.3d 1318, 1321 (11th Cir. 1994). While the peer review privilege has been upheld in a few cases within the Eleventh Circuit, those cases are distinguishable from the instant action on the basis that they did not involve the HCQIA immunity defense; nor did they involve federal civil rights claims. See *Somer v. Johnson*, 704 F.2d 1473, 1479 (11th Cir. 1983) (upholding similar privilege under Florida law in medical malpractice diversity action); *Doe*, 891 F. Supp. at 609 (upholding privilege under Georgia law where insurance company sought information regarding physician's suspended privileges due to alleged drug abuse). There is no Eleventh Circuit authority addressing application of the peer review privilege in a federal question case, particularly in a case involving the HCQIA immunity defense or civil rights claims of discrimination.[14] The Court understands the decision the Georgia legislature has made in adopting its peer review privilege: "[T]he enactment of such statutes represents a proper legislative choice between the competing public concerns of fostering medical staff candor, on the one hand, and impairing medical malpractice plaintiffs' access to evidence, on the other hand." *Eubanks v. Ferrier*, 245 Ga. 763, 765, 267 S.E.2d 230, 232 (1980). However, when a state law privilege would essentially

[14]Other circuits have rejected the application of the peer review privilege in federal question or civil rights cases, despite the widespread adoption of such statutory privileges throughout the United States. *See Virmani v. Novant Health, Inc.*, 259 F.3d 284, 293 (4th Cir. 2001); *Mem'l Hosp. v. Shadur*, 664 F.2d 1058, 1063 (7th Cir. 1981) (per curiam).

prevent a plaintiff from rebutting a federal immunity defense or would defeat a federal claim which bears little relation to the type of claim the privilege was designed to address, the need for probative evidence sufficiently outweighs the interests protected by the privilege.[15] The Court therefore finds that the Georgia peer review privilege cannot be used to prevent Plaintiffs from discovering peer review materials that may be relevant to rebut the Athens Vascular Defendants' HCQIA immunity defense.

2. Federal Self-Critical Analysis Privilege

Defendants also urge the Court to adopt the federal selfcritical analysis privilege, which offers substantially the same protections as the Georgia statutory peer review privilege. The Court has located no Eleventh Circuit decision applying this privilege in the HCQIA immunity context. District courts within the Eleventh Circuit have divided on the issue of whether the privilege should be applied in discrimination cases. *Compare Reid v. Lockheed Martin Aeronautics Co.*, 199 F.R.D. 379, 384-385 (N.D. Ga. 2001) with *Johnson v. United Parcel Serv., Inc.*, 206 F.R.D. 686, 690 (M.D. Ala. 2002). The Supreme Court has rejected the application of the privilege to peer review materials associated with a

[15]Furthermore, the Court notes that Congress, in enacting the HCQIA and providing immunity from civil damages to individuals who participate in medical peer review proceedings, specifically excluded immunity from suits brought for violations of civil rights. 42 U.S.C. § 11111(a)(1). While the HCQIA is certainly intended to promote the peer review process, it does not, by its terms, completely bar confidential peer review information from disclosure, particularly in cases where the peer review process itself is at issue.

professor's denial of tenure. *Univ. of Pa.*, 493 U.S. at 189.

The Eleventh Circuit has not explicitly recognized the self-critical analysis privilege, joining other federal Courts of Appeal in failing to do so. *See Dowling v. Am. Haw. Cruises, Inc.*, 971 F.2d 423, 425-26 & n.1 (9th Cir. 1992); *FTC v. TRW, Inc.*, 628 F.2d 207, 210 (D.C. Cir. 1980); *Emerson Elec. Co. v. Schlesinger*, 609 F.2d 898, 907 (8th Cir. 1979).[16] As a matter of federal common law, the self-critical analysis privilege does not exist. The Court finds that under the circumstances of this case such privilege cannot be applied to prevent the discovery of limited peer review materials.

Based on the foregoing, the Court finds that limited peer review materials are discoverable in this case. Therefore, the Court defers ruling on the Athens Vascular Defendants' summary judgment motion based on the HCQIA immunity defense, until this discovery has been completed.

D. The ARMC Defendants' Motion for Protective Order

As previously mentioned, the ARMC Defendants have filed a Motion for Protective Order to avoid having to produce the peer review materials sought by Plaintiffs in their discovery requests. For the reasons stated in this Order, the Court has concluded that those materials are not absolutely protected under the circumstances of this case. However, the Court also finds that Plaintiffs' discovery requests are overly broad. The Court finds that Plaintiffs' discovery should

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[16]See also Donald P. Vandergrift, Jr., The Privilege of Self-Critical Analysis: A Survey of the Law, 60 Alb. L. Rev. 171, 180-81 (1996).

be limited to those materials that pertain to the peer review specifically undertaken of Dr. Adeduntan arising from the emergency AAA surgery that precipitated the peer review in the first place. The Court therefore denies the ARMC Defendants' motion for a protective order to the extent they seek to prohibit Plaintiffs' access to Dr. Adeduntan's peer review materials, as described hereinabove. Accordingly, the ARMC Defendants are ordered to produce those peer review materials to Plaintiffs within thirty days of the date of this Order.[17]

V. CONCLUSION

The ARMC Defendants' Motion for Summary Judgment is granted as to all of Plaintiffs' claims. The Athens Vascular Defendants' Motion for Partial Summary Judgment is granted as to Plaintiffs' antitrust claims. The Court defers ruling on the Athens Vascular Defendants' Motion for Summary Judgment as to Plaintiffs' other claims based upon the HCQIA immunity defense until Plaintiffs have had a reasonable opportunity to complete their limited discovery regarding the peer review materials that the Court has ordered are discoverable. The ARMC Defendants' Motion for Protective Order is denied to the extent described in this Order.[18]

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[17]The Court observes that although it has granted summary judgment to the ARMC Defendants as to all of Plaintiffs' claims, it retains the authority to order the ARMC Defendants to produce the documents pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, as the Court has not entered final judgment as to those parties.

[18] In light of this ruling, the Court anticipates that the remaining parties may need to amend the scheduling/discovery order for the limited purpose of addressing the scheduling of the additional limited discovery permitted by this Order. The parties are ordered

IT IS SO ORDERED, this 25th day of August, 2005.

S/Clay D. Land
CLAY D. LAND
UNITED STATES DISTRICT JUDGE

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to confer and provide the Court with a proposed amended scheduling order within thirty days of the date of this Order.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ATHENS DIVISION

AZEEZ P. ADEDUNTAN,
VICTORY VASCULAR & GENERAL
SURGERY OF GEORGIA, P.C.

Plaintiffs,

vs. CASE NO. 3:04-CV-65 (CDL)

HOSPITAL AUTHORITY OF CLARKE
COUNTY d/b/a ATHENS REGIONAL
MEDICAL CENTER, ATHENS REGIONAL
MEDICAL CENTER, INC., ATHENS
REGIONAL HEALTH SERVICES, INC.,
ATHENS VASCULAR SURGERY, P.C.,
DAVID M. SAILORS, MARK J.
CONSTANTINO,

Defendants.

ORDER

Plaintiff Dr. Azeez P. Adeduntan and the ARMC Defendants have filed motions for summary judgment on the ARMC Defendants' counterclaim for attorney's fees. For the following reasons, the ARMC Defendants' motion (Doc. 125) is granted as to Athens

Regional Medical Center, Inc.'s entitlement to recover its attorney's fees, and Plaintiff's motion (Doc. 134) is denied. The Court further finds that it cannot determine the amount of fees recoverable from the present record, and that a hearing is necessary to determine the appropriate amount.

BACKGROUND

The Court previously granted summary judgment to Defendants Hospital Authority of Clarke County (doing business as Athens Regional Medical Center), Athens Regional Medical Center, Inc., and Athens Regional Health Services, Inc. (collectively the "ARMC Defendants") on all of Plaintiffs' claims (Doc. 113). The ARMC Defendants thereafter filed the presently pending Motion for Summary Judgment on their counterclaim for attorney's fees. That claim is based upon a provision in a contract between Plaintiff Dr. Azeez Adeduntan ("Adeduntan") and Athens Regional Medical Center, Inc. ("Athens Regional").

In order to apply for medical staff appointment and privileges at Athens Regional, Adeduntan was required to execute an Applicant's Consent and Release ("Release"). (Doc. 126 Ex. 2.) The Release generally releases Athens Regional from liability and requires Adeduntan to reimburse Athens Regional for costs and attorney's fees if he sues Athens Regional and does not prevail. The ARMC Defendants contend that they are entitled to recover their attorney's fees based upon this contractual agreement. Adeduntan responds that the agreement does not permit such recovery and has filed a cross motion for summary judgment.

DISCUSSION

Summary judgment is proper where "the pleadings, depositions, answers to interrogatories, and

admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). This case involves a matter of contract interpretation. Summary judgment is appropriate if no genuine issue of material fact exists as to the meaning and applicability of the contract provision in question.

The interpretation of the contract in this case is governed by Georgia law. Georgia courts use "ordinary rules of contract construction" in the interpretation of contracts under Georgia law. *Bitumious Cas. Corp. v. Advanced Adhesive Tech., Inc.*, 73 F.3d 335, 337 (11th Cir. 1996); *Park 'N Go of Ga., Inc. v. U.S. Fid. & Guar. Co.*, 266 Ga. 787, 791, 471 S.E.2d 500, 503 (1996). The purpose of contract construction is to ascertain the intention of the parties. "If that intention is clear and it contravenes no rule of law and sufficient words are used to arrive at the intention, it shall be enforced irrespective of all technical or arbitrary rules of construction." O.C.G.A. § 13-2-3.

In order to determine the parties' intent, Georgia courts have created a three-step process for contract construction. *Simpson v. Infinity Select Ins. Co.*, 269 Ga. App. 679, 681, 605 S.E.2d 39, 41 (2004) (citation omitted). First, the court must determine if the language of the contract is "clear and unambiguous." *Id.* (citation omitted). This is a question of law for the court. O.C.G.A. § 13-2-1. If the language is "clear, unambiguous, and capable of only one reasonable interpretation, no construction is necessary or even permissible [by the trial court]." *Estate of Sam Farkas, Inc. v. Clark*, 238 Ga. App. 115, 119-20, 517 S.E.2d 826, 820 (1999) (internal quotation marks and citation omitted) (alteration in original). If, however, the

language of the contract is ambiguous,[1] the court uses the rules of contract interpretation to give the terms their ordinary meaning. O.C.G.A. § 13-2-2; *Bituminous Cas.*, 73 F.3d at 337; *W. Pac. Mut. Ins. Co. v. Davies*, 267 Ga. App. 675, 676, 601 S.E.2d 363, 366 (2004). If after applying the rules of contract interpretation the contract is still ambiguous, the case must be submitted to the jury for a factual determination as to what the parties intended and what the language of the contract means. *Simpson*, 269 Ga. App. at 681, 605 S.E.2d at 42. As explained in the following discussion, the Court finds no such ambiguity that requires resolution by a jury. Therefore, summary judgment is the appropriate vehicle for deciding the issue presently before the Court.

The Athens Regional Release

Adeduntan applied for medical staff privileges four different times at Athens Regional. Each time he executed the same Release. The Release provides in relevant part:

D. Release and Immunity

By applying for appointment and clinical privileges, I accept the following conditions regardless of whether or not I am granted appointment or privileges and intend to be legally bound thereby. These conditions

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[1] An ambiguity is a "duplicity, indistinctness, or an uncertainty of meaning or expression." *Thomas v. B&I Lending, LLC*, 261 Ga. App. 39, 41, 581 S.E.2d 631, 634 (2003) (citation omitted). "[A] mere lack of clarity on causal reading is not the criterion for determining whether a contract is afflicted with ambiguity...." *McCann v. Glynn Lumber Co.*, 199 Ga. 669, 679, 34 S.E.2d 839, 845 (1945).

shall remain in effect for the duration of any term of appointment I may be granted:

1. To the fullest extent permitted by law, I extend absolute immunity to, and release from any and all liability, and agree not to sue the Hospital, its authorized representatives and any third parties, as defined below, for any action, recommendation, reports, statement, communications, or disclosures involving me, which are made, taken, or received by this Hospital or its authorized representatives relating, but not limited to the following:

   (a) application for appointment or clinical privileges, including temporary privileges;

   (b) periodic reappraisals undertaken for reappointment or for increase or decrease in clinical privileges;

   (c) proceedings for suspension or reduction of clinical privileges or for denial or revocation of appointment, or any other disciplinary action;

   . . .

   (i) matters or inquiries concerning professional qualifications, credentials, clinical competence, character, mental or emotional stability, physical condition, ethics, or behavior; and

   (j) any other matter that might directly or indirectly have an effect on my competence, on patient care or on

the orderly operation of this or any other hospital or health care facility.

. . .

3. The term "Hospital and its authorized representatives" means the Athens Regional Medical Center and any of the following individuals who have any responsibility for obtaining or evaluating my credentials, or acting upon my application or conduct in the Hospital:

. . .

6. **If, notwithstanding the provisions in this Section D, I institute legal action against the Hospital and/or its Medical Staff members and do not prevail, I agree to reimburse the Hospital and any Medical Staff members named in the action for any and all costs incurred in defending such legal action, including reasonable attorneys' fees.**

(Release 2-4)(emphasis added).

The ARMC defendants contend that this language is clear and unambiguous. They maintain that since they prevailed on their previous motions for summary judgment as to Plaintiffs' claims against them, they are entitled to recover their costs incurred in defending this action based upon this contractual provision.

Adeduntan responds that this release does not apply to the instant case because (1) the Release does not define "Hospital," and therefore it is ambiguous as to who is to be reimbursed under the contract; (2) the

Release is limited to actions arising from Adeduntan's application and reapplication for appointment and privileges; (3) the Release has a temporal limit—it applies only during a term of appointment; (4) the Peer Review Resolution Agreement ("PRRA") extinguishes the Release; and (5) the ARMC Defendants' affidavits are insufficient to entitle them to attorney's fees. The Court addresses each of Adeduntan's arguments in turn.

1. Definition of "Hospital"

Dr. Adeduntan argues that the word "Hospital" in the Release is ambiguous. Therefore, he contends, when construing the contract against the drafter, the word "Hospital" cannot refer to any of the ARMC Defendants. The Court finds that there is no ambiguity regarding the term "Hospital"—it refers to Athens Regional.

First, the Release is clearly on Athens Regional letterhead. Second, Adeduntan knew he was applying for appointment and privileges at Athens Regional and not some ambiguous "Hospital." Finally, the Release defines "Hospital and its authorized representatives" as "the Athens Regional Medical Center and any of the following individuals...." (Release at 3.) Therefore, "Hospital" unambiguously means Athens Regional.

The Court further finds, however, that the term "Hospital" does not include the Hospital Authority of Clarke County or Athens Regional Health Services. Had Athens Regional intended to include the Hospital Authority or Athens Regional Health Services in the Release, it could have done so.[2]

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[2] For example, all three ARMC Defendants were separately set out in the release provision of the PRRA. (PRRA ¶ 4.)

2. Limited to Actions Arising from Application

Next, Dr. Adeduntan claims that the language of the Release makes it "manifestly evident that the parties intended the application of the document [to] be limited to those circumstances whereby an applicant institutes an action against the hospital based upon an application or reapplication for Medical Staff appointment and clinical privileges...." (Pl.'s Mem. in Supp. of Mot. For Summ. J. 6.) Therefore, Adeduntan contends that the Release does not cover the claims in the instant case because the claims are not based upon an application or reapplication for appointment or privileges. The Court rejects Adeduntan's narrow interpretation of the Release.

The Release specifically releases the Hospital from liability for any action taken by the Hospital regarding a number of different subjects—the first two being "application for appointment or clinical privileges" and "periodic reappraisals undertaken for reappointment or for increase or decrease in clinical privileges." (See Release at D.1(a)-(j).) The remaining eight provisions cover a variety of actions the Hospital could take against a medical staff member including "proceedings for suspension or reduction of clinical privileges or for denial or revocation of appointment, or any other disciplinary action" and "Hospital and Medical Staff quality assessment/improvement requirements and programs." (Release D.1(c), (f).) Therefore, the Release is not limited to actions arising only from application or reapplication for appointment and privileges.

Additionally, even if the Court were to agree with Plaintiff that the Release is limited to actions arising from application or reapplication for

appointment and privileges, the claims against ARMC Defendants fall within that category. (See Compl. ¶¶ 22-25.)[3] Adeduntan claims that because he has not asked for reinstatement of his privileges or reappointment to the medical staff, his claims against the ARMC Defendants are not based upon his application or reapplication for appointment or privileges. This argument is contrary to Plaintiff's own Complaint where he argues that the failure to renew his appointment and privileges effectively resulted in his termination. (*See Id.*) Consequently, the claims made against the ARMC Defendants do fall within the scope of the Release.

3. Temporal Limitation

Adeduntan claims that the Release is limited temporally by clause D which states that the "conditions shall remain in effect for the duration of any term of appointment [a doctor] may be granted." The Court agrees that this language creates an ambiguity in the contract. Therefore, the Court must apply the rules of contract construction in order to eliminate the ambiguity. *Bituminous Cas.*, 73 F.3d at 337. "A contract should be construed by examining the agreement in its entirety and not merely isolated clauses and provisions thereof." *Jones v. Destiny Indus., Inc.*, 226 Ga. App. 6, 6, 485 S.E.2d 225, 226 (1997). Therefore, the Court "should avoid any construction that renders portions of the contract language meaningless." *Deep Six, Inc. v. Abernathy*, 246 Ga. App. 71, 74, 538 S.E.2d 886, 888 (2000). Furthermore, "[a] contract must be construed so as to

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[3] Adeduntan claimed that the ARMC Defendants engaged in a discriminatory pattern of behavior that resulted in the failure to renew his appointment and privileges.

reconcile its different provisions and to reject a construction that leads to a contradiction." *Anderson v. Anderson*, 274 Ga. 224, 228, 552 S.E.2d 801, 804 (2001).

Dr. Adeduntan's interpretation of Release paragraph D, that the terms of the Release are valid for only the duration of an appointment, creates a contradiction in the contract that ignores other contractual language. Specifically, paragraph D states that the applicant "accept[s] the following conditions regardless of whether or not [he is] granted appointment and privileges and intend[s] to be legally bound thereby." The next sentence then states that the conditions "shall remain in effect for the duration of any term of appointment [he] may be granted." Were the conditions to remain in effect only for the duration of a doctor's appointment, the language that states that the Release applies even if an applicant is not granted appointment or privileges would be rendered a nullity. A reasonable construction of the two sentences, when read together, yields the interpretation that the terms and conditions of the Release apply whether or not a person is granted appointment or privileges. The applicant recognizes that this includes, but is not limited to, the duration of any term of appointment.

The Court finds unpersuasive Plaintiff's argument that in essence an "only" should be read into the final sentence of paragraph D. The Release is not temporally limited to the term of appointment for a doctor. Consequently, the Release applies to the instant case.

4. PRRA

Adeduntan next claims that the PRRA extinguishes any prior agreement between himself and the ARMC Defendants. Adeduntan bases this argument

on the PRRA merger clause which states that the PRRA "constitutes the entire agreement between the parties and there are no other understandings, or agreements, written or oral, between them on the subject." This argument disregards relevant Georgia precedent and the separate nature of the two agreements.

In Georgia, "[o]ne simple contract does not merge or extinguish another." *Bowen v. Budd*, 164 Ga. App. 406, 407, 297 S.E.2d 334, 336 (1982) (quoting *Wylly v. Collins & Co.*, 9 Ga. 223, 224 (1851)). In *Bowen v. Budd*, the Georgia Court of Appeals explained that a merger clause in a partnership agreement that stated that "[t]his writing constitutes the entire Agreement among the parties and supersedes any prior understanding or Agreements among them respecting the subject matter" did not extinguish the original syndication agreement, requiring a syndication fee, between the same parties.[4] Since the parties had entered into two separate contracts dealing with two different subject matters, the court held that the "former agreement did not merge into the subsequent one[]." *Id.* at 408, 336.

Here the parties have also entered into two separate contracts dealing with different subject matters. First, the parties entered into a contract dealing with Adeduntan's application (and reapplication) for appointment and privileges at Athens Regional. The parties then subsequently entered into a contract

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[4] The syndication agreement "dealt with the terms by which prospective subscribers might purchase percentages of a proposed partnership and included . . . a breakdown of the investment costs ... among which was a syndication fee." *Bowen*, 164 Ga. App. at 407, 297 S.E.2d at 336.

regarding Dr. Adeduntan's peer review case and certain conditions to be fulfilled as a result of his peer review. Since these contracts are separate contracts dealing with different (albeit related) subject matters, the merger clause in the PRRA does not extinguish the Release. Therefore, the Release and the conditions contained therein are valid and enforceable.

5. Affidavits and Amount of Fees

Based on the foregoing, the Court finds that Athens Regional is entitled to recover its litigation expenses, including attorney's fees, reasonably incurred in defending Dr. Adeduntan's lawsuit against it. Those expenses shall be limited to expenses incurred by Athens Regional as to the claims made against Athens Regional. Athens Regional shall not recover expenses incurred in defense of any other defendants. The Court cannot determine from the present record the amount of expenses that are directly attributable to a defense of the claims made against Athens Regional. Accordingly, a hearing shall be scheduled to permit Athens Regional to present evidence as to that amount and to permit Adeduntan to contest that amount. That hearing shall be limited to the amount of expenses, and no evidence or argument will be received as to Athens Regional's entitlement to recover its reasonable fees and expenses arising from its defense of the claims Adeduntan asserted against Athens Regional.

The Court understands that there is overlapping of the defense in this case and that it is conceivable that the same amount of legal work may have been required had Athens Regional been the only defendant. However, that is not clear from the present record. At the hearing, Athens Regional should be prepared to exclude from its expense claim any legal work that was

done on behalf of the other defendants that would not have been necessary to the defense of Athens Regional.

Based on the Court's ruling, Adeduntan's argument regarding the affidavits is moot.

CONCLUSION

The Court finds that Athens Regional is entitled to recover the litigation expenses, including attorney's fees, that it incurred as a result of having to defend against the claims made against it by Dr. Adeduntan. Accordingly, to this extent, the ARMC Defendants' Motion for Summary Judgment (Doc. 125) is granted and Plaintiff's Motion for Summary Judgment (Doc. 134) is denied. At this time, the Court makes no award of fees and expenses. The Court defers that decision until after the hearing that will be scheduled regarding the amount of fees and expenses that is appropriate.

IT IS SO ORDERED, this 11th day of July, 2006.

S/Clay D. Land
CLAY D. LAND
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ATHENS DIVISION

AZEEZ P. ADEDUNTAN,
VICTORY VASCULAR & GENERAL
SURGERY OF GEORGIA, P.C.

Plaintiffs,

vs. CASE NO. 3:04-CV-65 (CDL)

HOSPITAL AUTHORITY OF CLARKE
COUNTY d/b/a ATHENS REGIONAL
MEDICAL CENTER, ATHENS REGIONAL
MEDICAL CENTER, INC., ATHENS
REGIONAL HEALTH SERVICES, INC.,
ATHENS VASCULAR SURGERY, P.C.,
DAVID M. SAILORS, M.D., MARK J.
COSTANTINO, M.D., BUSINESS DOES
1-25 and INDIVIDUAL DOES 1-25,

Defendants.

ORDER

Defendants Sailors, Costantino, and Athens Vascular Surgery (collectively "Athens Vascular Defendants") have filed a Motion for Summary Judgment. Plaintiff Dr. Azeez P.

Adeduntan[1] responds that genuine issues of material fact exist to be tried and that he should be permitted to conduct additional discovery before the Court rules upon Defendants' motion. (See Pl. Adeduntan's Mot. to Remove Limitations on Disc.) For the following reasons, the Court finds that Plaintiff is not entitled to conduct additional discovery, and that Defendants' Motion for Summary Judgment should be granted.

BACKGROUND

The Court previously granted summary judgment to the ARMC Defendants as to all of Plaintiff's claims against them based upon a release signed by Plaintiff.[2] (See Order, Aug. 25, 2005.) The Court also granted summary judgment to the Athens Vascular Defendants as to Plaintiff's antitrust claims. *Id.* The Court deferred ruling upon the Athens Vascular Defendants' Motion for Summary Judgment as to Plaintiff's remaining claims against them until Plaintiff had an opportunity to conduct limited discovery on those claims. Id. The remaining claims include federal law claims for racial discrimination in violation of 42 U.S.C. §§

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[1] Victory Vascular & General Surgery of Georgia, P.C., has no remaining claims against Dr. Costantino, Dr. Sailors, or Athens Vascular Surgery. Therefore, throughout this Order, "Plaintiff" refers to only Dr. Adeduntan.

[2] "ARMC Defendants" refers to those Defendants affiliated with Athens Regional Medical Center ("ARMC"), all of whom have been granted summary judgment previously.

1981 and 1985(3) and a state law claim for intentional infliction of emotional distress.

All of the Defendants have consistently maintained during the pendency of this case that evidence related to Dr. Adeduntan's medical peer review should not be discoverable because any such evidence is absolutely protected under the Georgia Peer Review Statute. The Court rejected this contention. However, in balancing the interest advanced by the Peer Review Statute with the Plaintiff's legitimate interest in obtaining discovery of relevant evidence to vindicate a protected federal right, the Court limited discovery to "those materials that pertain to the peer review . . . of Dr. Adeduntan arising from the emergency AAA surgery that precipitated the peer review in the first place." (Order 29, Aug. 25, 2005.)

Subsequent to that Order, the parties could not agree on the scope of the Court's discovery limitation. The Court sought to clarify the limitations on discovery. To balance the competing interests of privilege and reasonable disclosure, the Court concluded that discovery should proceed in stages. During the first stage, Plaintiff was entitled to discover peer review materials that connected Drs. Costantino and Sailors to the peer review process. (Order 2, Nov. 11, 2005.) Only after Plaintiff connected them sufficiently to the peer review by producing evidence that they influenced the peer review decisions would discovery proceed

with regard to other peer review evidence. If Plaintiff could not produce sufficient evidence from which a reasonable jury could conclude that Drs. Sailors and Costantino were even involved in influencing the peer review of Plaintiff, then no reason existed to allow Plaintiff to pierce the veil of confidentiality under the Peer Review Statute.

The Athens Vascular Defendants now contend that Plaintiff has had ample opportunity to discover evidence to support his claim that Drs. Costantino and Sailors were involved in the peer review process. Yet, according to Defendants, Plaintiff has failed to produce sufficient evidence from which a reasonable jury could conclude that they were involved in the peer review process in such a way as to influence the decision of the peer review committee. Therefore, the Athens Vascular Defendants argue that because neither Dr. Costantino nor Dr. Sailors was involved in the peer review process, summary judgment is appropriate.

Plaintiff responds that he has not had a reasonable opportunity to conduct discovery and that the Court should defer ruling on Defendants' motion until additional discovery is conducted. Plaintiff raises this issue in his response to Defendants' summary judgment motion and as a separate motion to remove limitations on discovery. The Court will address the discovery issue first, but before addressing that precise issue, the Court finds it helpful to

review the facts giving rise to this lawsuit.

FACTS GIVING RISE TO LAWSUIT

This lawsuit arises from the medical peer review of Plaintiff Dr. Azeez P. Adeduntan conducted after a patient of Dr. Adeduntan died at the Athens Regional Medical Center (ARMC). Dr. Adeduntan is a physician and surgeon with his own professional medical practice, Victory Vascular & General Surgery of Georgia, P.C., in Athens, Georgia. Dr. Adeduntan is African-American; his national origin is Nigerian. He first applied for and was granted medical staff privileges at ARMC, a local hospital, on August 28, 1996. These privileges allowed Dr. Adeduntan to admit and treat his patients in the hospital, so that ARMC could provide care for those patients during their stays. Dr. Adeduntan also maintained medical staff privileges at other Athens area hospitals, including St. Mary's Hospital.

ARMC requires that surgeons reapply for medical staff privileges on a regular basis. Dr. Adeduntan did as required, and his privileges were renewed on four separate occasions. In February 2002, Dr. Adeduntan performed an emergency abdominal aortic aneurysm (AAA) surgery in ARMC's operating room. The patient did not survive; the ARMC Defendants state that the patient died during the procedure, while Dr. Adeduntan contends that the patient was "clinically dead" before he was ever contacted for surgery.

Afterwards, ARMC's Surgical Case

Review Committee ("SCRC") conducted a peer review of the procedure and recommended to the credentialing committee that Dr. Adeduntan complete a continuing education course or arrange for a local proctor before performing the same procedure again at ARMC. Dr. Adeduntan appealed this recommendation and agreed to refrain from performing the procedure while the matter was unresolved. He still maintained all other medical staff privileges at ARMC at that time.[3]

On September 3 and October 6, 2003, Dr. Adeduntan filed two charges of discrimination with the EEOC regarding ARMC's peer review process.[4] Dr. Adeduntan applied for reappointment to the medical staff at ARMC on March 24, 2003, and ARMC granted him a six-month extension pending resolution of the peer review process on April 23, 2003. A second extension was granted in October 2003. On February 9, 2004, Dr. Adeduntan and the ARMC Defendants executed a Peer Review Resolution Agreement (PRRA), intended to encompass all issues and claims related to the

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[3] It appears that until April 30, 2004, when all of his staff privileges lapsed, Dr. Adeduntan maintained all privileges except for permission to perform AAA surgeries.

[4] The first charge of discrimination alleged that Dr. Adeduntan was subjected to peer review, had limited hospital privileges, and faced future loss of his hospital privileges because of his race and national origin. His second charge stated that he was subject to retaliation for filing the first charge.

peer review process. Dr. Adeduntan's privileges lapsed at the end of April 2004.[5] He filed the present action on July 1, 2004. As previously mentioned, the only claims remaining are his federal discrimination and state law intentional infliction of emotional distress claims against the Athens Vascular Defendants.

DISCUSSION

I. Motion to Remove Limitations on Discovery

Plaintiff contends that he has produced sufficient evidence to establish that genuine issues of material fact exist as to the involvement of Drs. Costantino and Sailors in Plaintiff's peer review evaluation, and that consequently, discovery should be opened to allow the Plaintiff to prove the doctors' racial animus. Specifically, Plaintiff requests (1) "the right to discover information on all peer reviews of Dr. Adeduntan;" (2) any peer review done on white American physicians for the past 20 years; (3) "all peer review materials" in any way related to Patient F;[6] (4) the right to depose

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[5] The ARMC Defendants state that Dr. Adeduntan's privileges lapsed because his application to renew them was incomplete in three ways: (1) he did not provide an appropriate written opinion from Dr. Vittimberga in accordance with the PRRA; (2) the reference from St. Mary's Hospital was not timely received; and (3) the reference from Elberton Hospital was never received.

[6] "Patient F" is the Athens Regional Emergency Room patient who's death resulted in Dr. Adeduntan's peer

members of the Emergency Care Committee who reviewed Patient F's case as relating to Dr. Burgess; (5) the right to depose Drs. Faibicher, Burgess, Rhodes, Bramlet, Dardick, and nurse Heather Pray; and (6) the right to redepose Drs. Hudson and Costantino. The Court finds, however, that Plaintiff has failed to produce sufficient evidence from which a reasonable jury could conclude that Drs. Costantino and Sailors were involved in influencing the peer review evaluation of Dr. Adeduntan. Since Plaintiff cannot establish their involvement, Defendants are entitled to summary judgment and no further discovery is appropriate. To the extent that Plaintiff contends that he was not permitted to conduct discovery to show the involvement of Drs. Costantino and Sailors, the Court rejects this frivolous contention as explained in the following discussion.

The Court's previous Order made it clear that Plaintiff would be entitled to conduct discovery reasonably calculated to lead to the discovery of evidence showing the involvement of Drs. Sailors and Costantino in the Plaintiff's peer review. (Order, Nov. 11, 2005.) Furthermore, Plaintiff took advantage of this opportunity by deposing the persons that were on the SCRC and involved in the peer review process. Although the Court limited depositions to one and a half hours, Plaintiff's counsel in

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review. His name is redacted in order to protect patient confidentiality.

many instances exceeded this time limitation. Plaintiff conducted more than ten depositions. It is perplexing that Plaintiff now complains about not being given an adequate opportunity for discovery, and yet, the Court notes that he spent much of his time in the depositions he did take discussing issues that were irrelevant as to whether Drs. Sailors or Costantino were even involved in the peer review process.

The primary objection that Plaintiff appears to have at this point relates to the involvement of an independent outside reviewer in his peer review. Plaintiff contends that Dr. Sailors improperly influenced the reviewer. Plaintiff now suggests that he should have been allowed to conduct additional discovery on this issue. Plaintiff's discovery on this issue, however, was never limited. He was permitted to question all of the witnesses about the issue; he was able to obtain documentary evidence regarding the issue; and the Court did not prohibit him from deposing the reviewer. Had he felt that the reviewer would not make himself available for a deposition, Plaintiff had every opportunity to bring that issue before the Court in a timely manner. This Plaintiff did not do.

It is absolutely clear that Plaintiff has had more than an adequate opportunity to discover evidence tying Drs. Sailors and Costantino to his peer review. No additional discovery is necessary or appropriate. Accordingly, Plaintiff's motion to remove

discovery limitations is denied, and the Court will decide Defendants' Motion for Summary Judgment on the present record.

II. Motion for Summary Judgment

A. Summary Judgment Standard

Summary judgment is proper where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party has the burden of showing that there is no genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). Once the moving party has met its burden, the burden shifts to the non-moving party to show that there is a genuine issue of material fact. *Id.* at 324. A fact is material if it "might affect the outcome of the suit." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). There is a genuine issue if the evidence would allow a reasonable jury to find for the non-moving party. *Id.* In other words, the inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id.* at 251-52.

B. Plaintiff's Federal Law Claims

Plaintiff asserts federal law claims against Drs. Costantino and Sailors for racial discrimination (42 U.S.C. §1981) and for conspiring to discriminate against him (42

U.S.C. §1985(3)). An essential element of each of these claims is that these Defendants' interfered with (or conspired to interfere with) Plaintiff's right to hospital privileges. If Defendants did not interfere with this right, then no claim exists even if the Court were to assume that racial animus existed.

The sole issue presented by Defendants' Motion for Summary Judgment is therefore whether genuine issues of material fact exist to be tried as to the involvement of Drs. Costantino and Sailors in influencing the peer review process regarding Plaintiff. See Fed. R. Civ. P. 56. If genuine issues of fact do not exist, then Defendants are entitled to summary judgment because Plaintiff cannot prevail on any of his claims against these Defendants if he cannot tie them to his peer review. If genuine issues of material fact are found to exist, Plaintiff would be entitled to additional discovery of evidence that is relevant to the other elements of his claims. The Court acknowledges that its approach in this case is somewhat unorthodox but finds that this approach is appropriate to protect peer review materials which would never need to be discovered if Plaintiff cannot overcome his first hurdle—sufficiently connecting Sailors and Costantino to his peer review.

The Court reviews the evidence in the record, construing it in favor of Plaintiff, to determine whether genuine issues of material fact exist to be tried as to Defendants'

involvement in the peer review.

1. Dr. Costantino

Plaintiff has produced no evidence that Dr. Costantino was involved in the peer review of Dr. Adeduntan. Plaintiff alleges the following in support of his contention that Dr. Costantino was involved in the peer review: (1) Dr. Costantino allegedly testified that he discussed Dr. Adeduntan's case with Dr. Sailors; (2) Dr. Costantino discussed the case with Dr. Rosemary Richards the day after Patient F's death; (3) Dr. Costantino agreed to mentor Dr. Adeduntan if Dr. Adeduntan agreed to the recommendations of the SCRC; (4) Dr. Costantino posted a letter written by Dr. Adeduntan in the doctors' lounge which slanted the opinion of the peer review committee against Dr. Adeduntan; (5) Dr. Costantino agreed to cover Dr. Adeduntan's emergency room calls at ARMC which involved aortic/iliac surgery; and (6) Dr. Costantino and Dr. Hudson had closed door conversations during the time of Dr. Adeduntan's peer review.

Preliminarily, the Court notes that many of Plaintiff's allegations are unsupported by the evidence in the record. For example, Dr. Costantino does not testify that he specifically discussed Dr. Adeduntan's case with Dr. Sailors. Instead, when asked if he "at any point in time discussed Dr. Adeduntan with Dr. Sailors[,]" Dr. Costantino answered that he had only discussed Dr. Adeduntan with Dr. Sailors "[i]n general terms." (Costantino Dep. 382:7-13,

Feb. 16, 2006.) Furthermore, Dr. Costantino specifically denied discussing Dr. Adeduntan's SCRC review with Dr. Sailors. (Id. at 382:14-17.) The same is true of Plaintiff's other assertions—either the testimony does not support the assertion, or the assertion is irrelevant as to whether Dr. Costantino was involved in the peer review.[7] The Court further observes that even if the Court accepted each of Plaintiff's allegations regarding Dr. Costantino's involvement, Plaintiff has failed to show how this alleged conduct influenced in any way the SCRC or peer review decisions. Accordingly, the Court finds that Dr. Costantino is entitled to summary judgment as to Plaintiff's federal law claims.

2. Dr. Sailors

Unlike Dr. Costantino, Dr. Sailors was a member of the hospital peer review committee. However, no evidence has been produced to contradict his testimony that he did not

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[7] For example, Dr. Costantino averred that he spoke with an anesthesiologist the day after Patient F's death, but could not remember if it was Dr. Richards. Furthermore, Dr. Costantino specifically denies speaking with Dr. Richards about her peer review presentation. (Costantino Dep. 152:18-155:4.) Additionally, Dr. Costantino denies ever posting any letter from Dr. Adeduntan. In fact, when asked why the letter was posted, Dr. Costantino replied that he believed it was posted to embarrass him. (Costantino Dep. 377:2-382:6.) Finally, Becky Eiss, the SCRC secretary stated that "Dr. Costantino did not participate at all in the peer review process. He never volunteered, nor was he sought." (Eiss Dep. 72:5-7, Mar. 23, 2006.)

participate in the "discussion []or the decision making of the [peer review] case involving Dr. Adeduntan." (Sailors Dep. 46:14-16, Feb. 13, 2006.) Although Dr. Sailors admits that he was present during the presentation of the case before the SCRC (Sailors Dep. 51:11-52:6), the evidence shows that after the presentation of Dr. Adeduntan's case, Dr. Sailors attempted to leave the SCRC meeting. (Sailors Dep. 52:6-22.) At that point, the committee members asked Dr. Sailors to define several terms for them including "pararenal aneurysm" and "iliac aneurysm." (Sailors Dep. 52:13-22.) Dr. Sailors defined those terms for the committee and then left the meeting. (Sailors Dep. 52:24-53:1.) The minutes from this SCRC meeting indicate that "the Vascular Surgery member of the committee recused himself during the decision making portion of [Dr. Adeduntan's] case[] discussion." (Sailors Dep. Ex. 1.)

Additionally, the minutes from the second SCRC meeting where Dr. Adeduntan's case was discussed indicate that while Dr. Sailors was present at the meeting, he recused himself during the decision making portion of the discussion. (Sailors Dep. Ex. 5.) The minutes, however, do not indicate whether Dr. Sailors participated generally in the discussion of Dr. Adeduntan's case, and Dr. Sailors testified that he does not remember the second meeting of the SCRC at all. (Sailors Dep. at 185:3-5.) The minutes from the third through sixth meeting of the SCRC indicate that Dr. Sailors was not present. (Sailors Dep. Ex. 9-12.)

Therefore, Dr. Sailors was only arguably involved in Dr. Adeduntan's peer review case in the first two SCRC meetings.

The testimony of the SCRC members shows that Dr. Sailors's involvement in the SCRC meetings was minimal at best. The witnesses who could recall any specifics from Dr. Adeduntan's peer review consistently corroborate Dr. Sailors's testimony that he left the SCRC when Dr. Adeduntan's case was discussed and decided.[8] For example, Dr. Hudson testified that in the SCRC meetings, Dr. Sailors answered specific questions asked by the committee so that the committee could understand the presentation of Dr. Adeduntan's case from a vascular surgeon's perspective. (Hudson Dep. 31:11-25, Mar. 17, 2005.) Then, Dr. Hudson explained, Dr. Sailors left the meeting before the discussion and decision portion of the meeting. (Hudson Dep. 39:2-5.) Dr. Gunn, the head of the SCRC, explained that Dr. Sailors was "asked about aneurysms in general . . . [a]nd then before [the SCRC] got into the discussion of [Dr. Adeduntan's] case specifically, [Dr. Sailors] said he felt he should

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[8] Drs. Parker, Obeidin, Malone, Eisenhart, and Cuff testified thatthey either had no specific memory of Dr. Adeduntan's peer review case at all or could not remember whether Dr. Sailors was at the SCRC meeting during the discussion of Dr. Adeduntan's case. (Parker Dep. 59:19-62:23, Jan. 19, 2006; Obeidin Dep. 47:17-48:5, Jan. 19, 2006; Malone Dep. 50:11-15, Jan. 23, 2006; Eisenhart Dep. 53:10-55:23, Jan. 20, 2006; Cuff Dep. 72:2-12, Jan. 19, 2006.)

leave." (Gunn Dep. 112:1-7, Mar. 24, 2006.) Dr. Richards, a member of the SCRC, also testified that Dr. Sailors recused himself. (Richards Dep. 46:1-8, Mar. 17, 2006.) Finally, Dr. Lober, the former head of the SCRC and present at only the second SCRC meeting where Dr. Adeduntan was discussed, stated that Dr. Sailors "was very adamant about not saying a whole lot about [Dr. Adeduntan's review] and [about] requesting that we send this to an outside reviewer . . . ." (Lober Dep. 36:24-37:2, Mar. 17, 2006.) Dr. Lober also testified that Dr. Sailors did not offer any technical assistance at this SCRC meeting. (Lober Dep. 42:2-12.) This testimony fails to show that Dr. Sailors influenced any decision by the SCRC as relating to Dr. Adeduntan. To the contrary, it shows that Dr. Sailors refused to participate in the discussion of Dr. Adeduntan's case.

Dr. Sailors does admit that he reviewed and edited questions written by Dr. Hudson, the Athens Regional Chief of Staff, that were given to the outside reviewers of Dr. Adeduntan's case. (Sailors Dep. 207:2-211:10, Ex. 8.) Dr. Sailors explains that Dr. Hudson wanted a vascular surgeon to review the questions before they were sent out because, as a psychiatrist, Dr. Hudson was worried about the wording of the questions. (Id. at 209:16-22.) The testimony of Dr. Hudson indicates that Dr. Sailors did not create any questions that were subsequently sent to the outside reviewers. (Hudson Dep. 27:12-17, 28:3-9, 41:6-22.) Instead, Dr. Hudson explains that as a psychologist, he was

unfamiliar with vascular surgeon terminology; therefore, after the SCRC created questions for the outside reviewers, Dr. Hudson asked Dr. Sailors to review and edit those questions for clinical accuracy. (Hudson Dep. 27:12-17, 41:17-22.)

Plaintiff argues that this involvement on the part of Dr. Sailors—his participation in the first two SCRC meetings and his editing of the questions for outside reviewers—is sufficient to create genuine issues of material fact as to whether Sailors influenced the peer review process against Plaintiff. To the contrary, the evidence shows that both of the outside reviewers, Drs. Vittimberga and Dardik, conducted independent reviews of Dr. Adeduntan's surgical performance. *Cf. Pennington v. City of Huntsville*, 261 F.3d 1262, 1270 (11th Cir. 2001) ("Where a decisionmaker conducts his own evaluation and makes an independent decision, his decision is free of the taint of a biased subordinate employee."); *Llampallas v. Mini-Circuits Lab, Inc.*, 163 F.3d 1236, 1248-49 (11th Cir. 1998) (same). Although both doctors answered the questions provided by the SCRC, there is no evidence that either of their independent reviews was tainted by the specific changes made by Dr. Sailors. It would not be enough for Plaintiff to show that the outside reviewers were tainted by the questions given to them because the evidence shows that the questions reflect the concerns of the SCRC. In order to show a causal link, Plaintiff would have to provide some evidence that either (1)

the questions reflect only Dr. Sailors's concerns, and those concerns biased the outside reviewers' independent evaluations, or (2) that the *changes* made to the questions tainted the outside reviewers' evaluations. Plaintiff has not provided evidence of either.[9] Instead, Plaintiff argues generally that because Dr. Sailors edited the questions, he necessarily tainted the investigation conducted by the outside reviewers, which necessarily tainted the decision of the SCRC. This proffer, without any supporting evidence, and in fact with evidence to the contrary,[10] is not sufficient to sustain Plaintiff's burden of producing evidence from which a reasonable jury could conclude that Dr. Sailors was sufficiently involved in the conduct

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[9] In fact, Plaintiff argued to this Court that the outside reviews were actually favorable to Dr. Adeduntan. (See Pl.'s Ex. 2.) Additionally, Plaintiff was not prevented from deposing either of the outside reviewers in order to show some involvement of Dr. Sailors in their reviews, but Plaintiff chose not to do so.

[10] For example, Dr. Dardik explained in his report that he conducted his own review of the peer review case in question. In that independent evaluation, Dr. Dardik examined the medical records, hospital medical chart, Dr. Adeduntan's curriculum vitae, the questions given to Dr. Adeduntan, Dr. Adeduntan's reply, the Athens Regional surgery log, the statements of the anesthesiologists, and the list of surgical concerns of the SCRC. Dr. Dardik first provided a general statement discussing his findings. Dr. Dardik then went on to answer each of the questions edited by Dr. Sailors. Furthermore, Dr. Dardik's evaluation, as the Plaintiff has repeatedly mentioned, is partially favorable to Dr. Adeduntan.

of which Plaintiff complains. *Nebraska v. Wyoming*, 507 U.S. 584, 590 (1993) ("When the nonmoving party bears the burden of proof at trial, summary judgment is warranted if the nonmovant fails to 'make a showing sufficient to establish the existence of an element essential to [its] case.'")(quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)). Therefore, summary judgment is appropriate for Dr. Sailors as to Plaintiff's federal law claims.

C. State Law Claim

In addition to his federal law claims, Plaintiff claims that Dr. Costantino and Dr. Sailors are liable to him for the state law claim of intentional infliction of emotional distress. "A claim for intentional infliction of emotional distress has four elements: (1) the conduct was intentional or reckless; (2) the conduct was extreme and outrageous; (3) the conduct caused emotional distress[;] and (4) the emotional distress was severe." *Amstadter v. Liberty Healthcare Corp.*, 233 Ga. App. 240, 242-43, 503 S.E.2d 877, 880 (1998). In order for the Defendants' conduct to be sufficiently extreme, it must be "so terrifying or insulting as naturally to humiliate, embarrass or frighten the plaintiff." *Bridges v. Winn-Dixie Atlanta, Inc.*, 176 Ga. App. 227, 229, 335 S.E.2d 445, 447 (1985) (internal quotation marks and citation omitted). "The mere termination of employment does not authorize a recovery for intentional infliction of emotional distress." *Amstadter*, 233 Ga. App. at 243, 503 S.E.2d at 880 (quotation

marks and citation omitted). Furthermore, "mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities" do not give rise to a claim for intentional infliction of emotional distress. *Id.* (quotation marks and citation omitted).

Plaintiff argues that Drs. Costantino and Sailors's statements that Dr. Adeduntan is "slow" in surgery and "incompetent" are the types of statements that give rise to a claim for intentional infliction of emotional distress. Whether these statements rise "to the requisite level of outrageousness and egregiousness to sustain a claim for intentional infliction of emotional distress is a question of law." *Yarbray v. S. Bell Tel. & Tel. Co.*, 261 Ga. 703, 706, 409 S.E.2d 835 838 (1991). The Court finds that in this case, the statements allegedly made by Drs. Costantino and Sailors are exactly the type of insults, indignities, or petty oppressions which the Georgia Courts have consistently held do not give rise to a claim of intentional infliction of emotional distress. See, e.g., *Amstadter*, 233 Ga. App. at 242-44, 503 S.E.2d at 880-81; *Bivens Software, Inc. v. Newman*, 222 Ga. App. 112, 113-15, 473 S.E.2d 527, 529-30 (1996). Therefore, Defendants' Motion for Summary Judgment is granted as to Plaintiff's state law claim for intentional infliction of emotional distress.

CONCLUSION

Plaintiff is not entitled to additional discovery, and Plaintiff's Motion to Remove

Limitations on Discovery (Doc. 148) is denied. Defendants' Motion for Summary Judgment (Doc. 175) is granted as to all of Plaintiff's claims against Drs. Costantino and Sailors.[11]

IT IS SO ORDERED, this 21st day of September, 2006.

s/Clay D. Land
CLAY D. LAND
UNITED STATES DISTRICT JUDGE

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[11] Summary judgment is also granted in favor of Athens Vascular Surgery because if its agents, Sailors and Costantino, have no liability, the principal likewise has no liability.

APPENDIX D

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 06-15507

D. C. Docket No. 04-00065-CV-CDL-3

AZEEZ P. ADEDUNTAN, M.D.,

Plaintiff-Counter-Defendant-Appellant,

VICTORY VASCULAR & GENERAL SURGERY OF GEORGIA, P.C,

Plaintiff-Appellant,

versus

HOSPITAL AUTHORITY OF CLARKE COUNTY,
d.b.a. Athens Regional Medical Center,
ATHENS REGIONAL MEDICAL CENTER,
ATHENS REGIONAL HEALTH SERVICES, INC.,

Defendants-Counter-Claimant-Appellees,

ATHENS VASCULAR SURGERY, P.C.,

DAVID M. SAILORS, M.D., et al.,

Defendants-
Appellees.

Appeal from the United States District Court
for the Middle District of Georgia

(September 25, 2007)

Before CARNES, BARKETT and HILL, Circuit Judges.

PER CURIAM:

Dr. Azeez P. Adeduntan appeals the district court's grant of summary judgment to the defendants, Athens Regional Medical Center, Athens Vascular Surgery, P.C., and a number of their individual employees (1) on his ten federal and state law claims, and (2) on Athens Regional's counterclaim for contractual attorney's fees.

The defendants moved to dismiss this appeal for lack of jurisdiction because the court has yet to decide the amount of attorney's fees owed to Athens Regional under the contract between it and Adeduntan, which served as the basis for a counterclaim by Athens Regional against him. According to the defendants (the

other defendants have joined the motion to dismiss), because the district court has not resolved the issue of the amount of fees owed by Adeduntan to Athens Regional, which is part and parcel of the merits of the counterclaim, summary judgment for the defendants on the other issues and claims is not a "final decision" that can be appealed under 28 U.S.C. § 1291. Where there is a question as to our appellate jurisdiction, we have an obligation to review it before we turn to the merits of the appeal. See Main Drug, Inc. v. Aetna U.S. Healthcare, Inc., 475 F.3d 1228, 1229 (11th Cir. 2007).

Section 1291 provides the general rule that we have "jurisdiction of appeals from all final decisions of the district courts of the United States." 28 U.S.C. § 1291. This is the most common basis for our appellate jurisdiction, and it is the jurisdictional hook relied on by Adeduntan in this appeal. He does not cite any other basis for our jurisdiction, cf. id. § 1292, and we haven't found any that would arguably apply here. Jurisdiction to hear the merits of Adeduntan's appeal therefore hinges on whether the district court's summary judgment for the defendants, reserving the amount of fees owed to Athens Regional as a result of its contract counterclaim, is a "final decision" under § 1291.

"At common law," the rule was that "attorney's fees were regarded as an element of 'costs' awarded to the prevailing party, which are not generally treated as part of the merits

judgment." Budinich v. Becton Dickinson & Co., 486 U.S. 196, 200, 108 S. Ct. 1717, 1721 (1988) (citation omitted). Since an attorney's fees award was not considered part of the merits of the case, the absence of a fee award from the judgment for the winning party did not render that judgment non-final, precluding an immediate appeal by the losing party under § 1291. See id. at 200–01, 108 S. Ct. at 1721.

However, there is an exception to the common law rule that an attorney's fees award is not part of the merits of the case and does not render the judgment non-final. The exception applies where "the attorney's fees are an integral part of the merits of the case and the scope of relief." Ierna v. Arthur Murray Int'l Inc., 833 F.2d 1472, 1475 (11th Cir. 1987)(citing Holmes v. J. Ray McDermott & Co., 682 F.2d 1143, 1146 (5th Cir. 1982)). In such cases, the attorney's fees "cannot be characterized as costs or as collateral and their determination is a part of any final, appealable judgment." Id. Thus, in cases where attorney's fees are an integral part of the merits of a claim or counterclaim, the district court's judgment disposing of all other claims does not become final, and we lack appellate jurisdiction, until all the fee issues are decided.

Our case law supports the defendants' position that the attorney's fees due Athens Regional as part of its counterclaim against Adeduntan are an integral part of the merits of this case because they were awarded to Athens

Regional based on a contract between it and Adeduntan. In Ierna, where the contract between the parties provided that the "prevailing party in the arbitration shall be awarded, in addition to any other relief granted, all of its costs and expenses of any such arbitration proceeding, including reasonable attorneys' fees," we said:

> When the parties contractually provide for attorneys' fees, the award is an integral part of the merits of the case.... Because the parties provided in their agreement for costs and expenses to be awarded to the prevailing party, the award is integral to the merits. The district court's order, therefore, did not become final and appealable until the court calculated the final award of costs and expenses to appellees as prevailing parties.

833 F.2d at 1476. Likewise, in Brandon, Jones, Sandall, Zeide, Kohn, Chalal & Musso, P.A. v. MedPartners, Inc., 312 F.3d 1349 (11th Cir. 2002), we reiterated the rule "[i]n this Circuit" that "a request for attorneys' fees pursuant to a contractual clause is considered a substantive issue; and an order that leaves a substantive fees issue pending cannot be 'final.'" Id. at 1355.

In this case, there is no dispute that Athens Regional's counterclaim for attorney's fees was based on a contract between it and

Adeduntan. The "Consent and Release" form that he signed in exchange for his appointment to the medical staff at Athens Regional provided: "If ... I institute action against the Hospital ... and do not prevail, I agree to reimburse the Hospital ... for any and all costs incurred in defending such legal action, including reasonable attorney's fees." The district court granted summary judgment to Athens Regional on its counterclaim for fees based on the contract insofar as entitlement is concerned. The court, however, concluded that it could not determine from the record as it then stood the amount of fees due and that a hearing would be necessary for that reason. Adeduntan filed his notice of appeal before the district court held a hearing on the fees issue.

We are aware that the Supreme Court said in Budinich that "[c]ourts and litigants are best served by the bright-line rule, which accords with traditional understanding, that a decision on the merits is a 'final decision' for purposes of §1291 whether or not there remains for adjudication a request for attorney's fees attributable to the case." 486 U.S. at 202–03, 108 S. Ct. at 1722. And we are aware that this Court has said of Budinich that "the Supreme Court held that both the imposition and the amount of attorney's fees are always collateral to the merits of an action." Fluor Constructors, Inc. v. Reich, 111 F.3d 94, 96 (11th Cir. 1997); see also LaChance v. Duffy's Draft House, Inc., 146 F.3d 832, 837 (11th Cir. 1998)(stating that Budinich "held that attorney's fees is always a

collateral issue"). Adeduntan contends that Budinich and our two opinions characterizing it mean that the exception to the attorney's-fees-as-collateral-issue for fees awarded based on a contract has been undermined.

While we are sympathetic to Adeduntan's position, we as a panel cannot adopt it. Budinich, Fluor, and LaChance were all cases where the attorney's fees were awarded by the courts based on a prevailing party statute, rather than as part of the contract. Budinich, 486 U.S. at 197, 108 S. Ct. at 1719 (awarded based on Colorado statute which gave fees to prevailing party in any employment compensation case); Fluor, 111 F.3d at 95 (fees requested pursuant to attorney's fees provision in Energy Reorganization Act of 1974); LaChance, 146 F.3d at 833 (ADA case). The facts of those three cases could not have presented, and did not present, the issue of whether the amount of attorney's fees due to be awarded pursuant to a contract is a substantive issue, which would, if left open, render the judgment non-final for § 1291 purposes. As a result, those three decisions could not have decided the contract-fees-as-a-merits-decision issue because their facts did not present that issue.

Decisions, even Supreme Court decisions, can make law only to the extent of their facts; all else is dicta. See Watts v. BellSouth Telecomm., Inc., 316 F.3d 1203, 1207 (11th Cir. 2003)("Whatever their opinions say, judicial

decisions cannot make law beyond the facts of the cases in which those decisions are announced."); United States v. Aguillard, 217 F.3d 1319, 1321 (11th Cir. 2000)(per curiam)("The holdings of a prior decision can reach only as far as the facts and circumstances presented to the Court in the case which produced that decision." (citations and internal quotation marks omitted)). The only previous cases that have squarely presented the contract-attorney's-fees-final-judgment issue to this Court were Ierna and MedPartners. In both of them this Court held that "a request for attorneys' fees pursuant to a contractual clause is considered a substantive fees issue; and an order that leaves a substantive issue pending cannot be 'final.'" MedPartners, 312 F.3d at 1355 (citing Ierna, 833 F:2d at 1476).

It could be argued that the holding of the Ierna decision was undermined by the sweeping language in the later decision of the Supreme Court in Budinich, even though that case did not squarely present the issue as to contractual attorney's fees. However, in addition to the principle, which we have just discussed, that holdings are limited to the issues actually presented by the particulars of a case, there is also the fact that MedPartners, which reiterated our holding in Ierna, came after Budinich, not before it. Therefore, MedPartners establishes the law of this circuit on the issue in the post-Budinich era. For better or for worse, whether wrong or right, MedPartners is binding panel precedent that we must follow until this

Court sitting en banc, or the Supreme Court, decides otherwise in a case that presents the contract-attorney's-fees issue. See United States v. Steele, 147 F.3d 1316, 1317–18 (11th Cir. 1998)(en banc).[1]

Until that happens, this appeal is controlled by MedPartners and Ierna. And under those two decisions Adeduntan's appeal is due to be dismissed as premature. Of course, he may file another one after the district court enters an order determining the amount of fees

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[1] We are aware that the MedPartners decision did not explicitly address the argument that Budinich undermined the holding of Ierna. However, we have held a number of times that a prior panel precedent cannot be circumvented or ignored on the basis of arguments not made to, or factors not considered by, the prior panel. See, e.g., Saxton v. ACF Indus., 239 F.3d 1209, 1215 (11th Cir. 2001) ("that holding [of the earlier panel] is the law of this Circuit regardless of what might have happened had other arguments been made to the panel that decided the issue first")(citation omitted); Smith v. GTE Corp., 236 F.3d 1292, 1302–03 (11th Cir. 2001)(categorically rejecting an "overlooked reason" exception to the prior precedent rule); Turner v. Beneficial Corp., 236 F.3d 643, 650 (11th Cir. 2000)("Nor is the operation of the rule dependent upon the skill of the attorneys or wisdom of the judges involved with the prior decision—upon what was argued or considered."); Cohen v. Office Depot, Inc., 204 F.3d 1069, 1076 (11th Cir. 2000)(same); United States v. Bascaro, 742 F.2d 1335, 1343 (11th Cir. 1984)("[T]he mere act of proffering additional reasons not expressly considered previously. . . will not open the door to reconsideration of the question by a second panel.").

owed. At that time the district court's judgment will be "final" and appealable under § 1291.[2]

APPEAL DISMISSED.[3]

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[2] In any future appeal, in order to minimize 2 expenses, the parties may wish to move this Court for permission to rely on the briefs they have already filed, supplemented with any additional briefing related to intervening decision on the attorney's fees issue.

[3] This appeal was originally scheduled for oral argument, but it was removed from the oral argument calendar pursuant to 11th Cir. R. 34-3(f).

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 06-15507

AZEEZ P. ADEDUNTAN, M.D.,

Plaintiff-Counter-Defendant-Appellant,

VICTORY VASCULAR & GENERAL SURGERY OF GEORGIA, P.C,

Plaintiff-Appellant,

versus

HOSPITAL AUTHORITY OF CLARKE COUNTY,
d.b.a. Athens Regional Medical Center,
ATHENS REGIONAL MEDICAL CENTER,
ATHENS REGIONAL HEALTH SERVICES, INC.,

Defendants-Counter-Claimant-Appellees,

ATHENS VASCULAR SURGERY, P.C.,
DAVID M. SAILORS, M.D., et al.,

Defendants-Appellees.

On Appeal from the United States District Court for the Middle District of Georgia

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ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

Before CARNES, BARKETT and HILL, Circuit Judges.
PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are denied.

ENTERED FOR THE COURT:

sEd Carnes
UNITED STATES CIRCUIT JUDGE

ORD-42
(2/05)

APPENDIX F

Athens Regional Medical Center

APPLICANT'S CONSENT AND RELEASE

A. Applicant's Responsibility

1. I apply for Medical Staff appointment and clinical privileges as requested above. I am willing to make myself available for interviews in regard to this application and intend to be legally bound by the terms of this Consent and Release.

2. As an applicant for staff appointment and privileges, I understand it is my responsibility to produce adequate information so the Hospital can perform a proper evaluation of my application. I agree to provide the Hospital with updated information regarding all questions on this application form as new information becomes available. I also agree to provide the Hospital with additional information that the Hospital or one of its authorized representative may request. Failure to produce any requested

information will prevent my application from being processed.

B. Terms and Conditions of Appointment and Privileges

1. By applying for appointment and clinical privileges to practice at the Hospital, I accept the terms and conditions set forth below and intend to be legally bound thereby;

(a) Medical Staff appointment and clinical privileges at this Hospital are not a right of every licensed professional who makes application for the same;

(b) my request will be evaluated in accordance with prescribed procedures defined in the Hospital's corporate and Medical Staff Bylaws and applicable policies, rules and regulations, and directives;

(c) all Medical Staff recommendations relative to my application are subject to the ultimate action of the Athens Regional Medical Center, Inc. Hospital Board and that the decision of the Board shall be final;

(d) if appointed, my initial appointment and clinical privileges shall be provisional for the time period determined by the Board;

(e) I have the responsibility to keep this application current by informing the Hospital through the Chief Executive Officer or his designee, of any changes including but not limited to any change in my professional liability insurance coverage, the filing of a lawsuit against me, and any change in my Medical Staff status at any other hospital; and

(f) reappointment and continued clinical privileges remain contingent upon my continued demonstration of professional competence and cooperation, acceptable performance of all related responsibilities, as well as the other factors deemed relevant by the Hospital.

C. Undertakings

1. I have received and have had an

opportunity to read a copy of the bylaws and such Medical Staff and Hospital policies and directives as are applicable to appointees to the Medical Staff, including the bylaws, policies, and rules and regulations of the Medical Staff. I specifically agree to abide by the bylaws, policies, rules and regulations, and directives that are in force during the time I am appointed to the Medical Staff.

2. If appointed and/or granted clinical privileges, I specifically agree to:

(a) refrain from fee splitting or other inducements relating to patient referral;

(b) refrain from delegating responsibility for diagnosis or care of hospitalized patients to any other practitioner who is not qualified to undertake this responsibility or is not adequately supervised;

(c) refrain from deceiving patience as to the identity of any practitioner providing treatment or services;

(d) seek consultation whenever necessary or required;

(e) abide by generally recognized ethical principles applicable to my profession;

(f) provide continuous care and supervision as needed to all patients in the Hospital for whom I have responsibility; and

(g) accept committee assignments and such other duties and responsibility as shall be assigned to me by the Hospital and Medical Staff

D. Release and Immunity

By applying for appointment and clinical privileges, I accept the following conditions regardless of whether or not I am granted appointment or privileges and intend to be legally bound thereby. These conditions shall remain in effect for the duration of any term of appointment I may be granted:

1. To the fullest extent permitted by law, I extend absolute immunity to, and release from any and all liability, and agree not to sue the Hospital, its authorized representatives and any third parties, as defined below, for any action, recommendation, reports, statement, communications, or

disclosures involving me, which are made, taken, or received by this Hospital or its authorized representatives relating, but not limited to, the following:

(a) application for appointment or clinical privileges, including temporary privileges;

(b) periodic reappraisals undertaken for reappointment or for increase or decrease in clinical privileges;

(c) proceedings for suspension or reduction of clinical privileges or for denial or revocation of appointment, or any other disciplinary action;

(d) precautionary suspensions;

(e) hearings and appellate reviews;

(f) Hospital and Medical Staff quality assessment/improvement requirements and programs;

(g) utilization reviews;

(h) any other Hospital, Medical Staff, department, service, or committee activities;

(h) matters or inquiries concerning professional qualifications, credentials, clinical competence, character, mental or emotional stability, physical condition, ethics, or behavior; and

(i) any other matter that might directly or indirectly have an effect on my competence, on patient care or on the orderly operation of this or any other hospital or health care facility

The foregoing shall also be privileged to the fullest extent permitted by law and the privilege shall extend to the Hospital and its authorized representatives, and to any third parties.

2. I authorize the Hospital and its authorized representatives to consult with any third party who may have information bearing on my professional qualifications (credentials), clinical competence, character, mental or emotional stability, physical condition, ethics, behavior, or any other matter bearing on my qualifications for appointment to the Medical Staff. This authorization includes the

right to inspect or obtain any, and all documents, recommendations, reports, statements, or disclosures relating to such questions. I also expressly authorize said third parties to release this information to the Hospital and its authorized representatives upon request.

3. The term "Hospital and its authorized representatives" means the Athens Regional Medical Center and any of the following individuals who have any responsibility for obtaining or evaluating my credentials, or acting upon my application or conduct in the Hospital:

(a) members of the Board and their appointed representatives;

(b) the Chief Executive Officer or his/her designees;

(c) all appointees to the Medical Staff;

(d) other Hospital employees;

(e) consultants to the Hospital; and

(f) the Hospital's attorney and his/her partners, associates, or designees.

4. The term "third parties" means all individuals from whom

information has been requested by the Hospital or its authorized representatives or who have requested such information from the Hospital and its authorized representatives, including the following:

(a) appointees to the Hospital's Medical Staff;

(b) appointees to the medical staff of other hospitals or health care facilities;

(c) other physicians or health practitioners;

(d) nurses;

(e) government agencies; and

(f) organizations, associations, partnerships, and corporations, whether hospitals, health care facilities or not.

5. I agree that they hearing and appeal procedures set forth in the Policy on Appointment, Reappointment, and Clinical Privileges shall be my sole and exclusive remedy with respect to any professional review action taken at this Hospital.

6. If, notwithstanding the provisions in this Section D, I institute legal action against the Hospital and/or

its Medical Staff members and do not prevail, I agree to reimburse the Hospital and any Medical Staff members named in the action for any and all costs incurred in defending such legal action, including reasonable attorneys' fees.

E. Affirmation

I represent that information provided in or attached to this application is accurate and complete. I understand that, as a condition of this application, any misrepresentation, misstatement, or omission from this application, whether intentional or not, shall constitute cause for the immediate cessation of the processing of the application and no further processing shall occur. In the event that an appointment has been granted prior to the discovery of such misrepresentation, misstatement, or omission, such discovery may be deemed to constitute automatic relinquishment of clinical privileges and medical staff appointment. In either situation, there shall be no entitlement to any hearing or appeal rights that are contained in the Hospital or Medical Staff bylaws or policies.

DATE: 6/9/99 s/AzeezP. Adeduntan

Signature of Practitioner

Azeez P. Adeduntan

Printed or Typed Name of Practitioner

93

(2)

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MAY 21 2008
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SUPREME COURT, U.S.

No. 07-1079

In The

Supreme Court of the United States

AZEEZ P. ADEDUNTAN, M.D. and
VICTORY VASCULAR & GENERAL SURGERY OF GEORGIA, P.C.,

Petitioners,

v.

HOSPITAL AUTHORITY OF CLARKE COUNTY D/B/A ATHENS REGIONAL MEDICAL CENTER, ET AL.

Respondents.

On Petition For Writ Of Certiorari To The United States Court of Appeals for the Eleventh Circuit

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REPLY TO BRIEF IN OPPOSITION

LAWRENCE E. NEWLIN
Counsel of Record
JEFFREY N. SCHWARTZ
LAWRENCE E. NEWLIN & ASSOCIATES, P.C.
2394 Mt. Vernon Road, Suite 220
Atlanta, Georgia 30338
(678) 587-9000
Counsel for Petitioners

QUESTION PRESENTED FOR REVIEW

Whether an order is final pursuant to 28 U.S.C. §1291 under the "bright-line rule" articulated by this Court in Budinich v. Becton Dickinson & Co., 486 U.S. 196, 200, 108 S. Ct. 1717, 1721 (1988), when liability for attorney's fees pursuant to a prevailing party clause in a contract has already been found, and only the amount of fees remains pending in the trial court.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 29.6

Petitioners

Azeez P. Adeduntan, M.D.

Victory Vascular and General Surgery of Georgia, P.C.

No parent or publicly held company owns 10% or more of the stock of Petitioner Victory Vascular & General Surgery, P.C.

Respondents

Athens Regional Health Services, Inc.

Athens Regional Medical Center, Inc.

Athens Vascular Surgery, P.C.

Mark J. Costantino, M.D.

Hospital Authority of Clark County d/b/a Athens Regional Medical Center

David M. Sailors, M.D.

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REPLY TO BRIEF IN OPPOSITION

Petitioners respectfully submit this Reply to Brief in Opposition to their Petition for Writ of Certiorari.

Contrary to the assertion made by Respondents, Petitioners respectfully submit that this matter presents the ideal case for this Court to clarify its holding in Budinich v. Becton Dickinson & Co., 486 U.S. 196, 108 S. Ct. 1717 (1988), and definitively hold that a decision on the merits is a "final decision" for purposes of §1291, whether or not there remains for adjudication a **contractual or statutory** request for attorney's fees attributable to the case.

Respondents assert three unavailing new reasons why this Court should forego the opportunity presented by this case to conclusively resolve the circuit split and to clarify for courts and litigants the bright-line rule.

The issue presented here is ***whether*** the appeal will be heard, and not *when* it will be heard, as argued by Respondents. The issue presented in the Petition is relevant to the outcome of the case, and potentially could result in Petitioners having no remedy at all. The real risk here is that this Court could later clarify Budinich to deviate from the rule articulated in Brandon, Jones, Sandall, Zeide, Cohn, Chalal & Musso, P.A. v. MedPartners, Inc., 312 F.3d 1349 (11th Cir. 2002) before there is an award of attorney's fees for Dr. Adeduntan to appeal, and Dr. Adeduntan will be left without any ability to appeal anything except the amount of fees awarded. The Eleventh

Circuit could abandon its contrary rule and join the majority of other circuits in following the bright-line rule articulated in Budinich, making any subsequent appeal of substantive issues by Dr. Adeduntan untimely. Respondents acknowledge this possibility, stating:

> . . . if a party followed the Eleventh Circuit rule as to the time for appeal in a circuit which has adopted or then adopts a contrary rule, **the resulting appeal would be untimely, and would be dismissed with prejudice.**

Br. in Opp'n at 6 (emphasis added). If Petitioners appeal after the fee award, Petitioners will not then argue that their subsequent appeal is untimely under Budinich.

In an attempt to distinguish the facts of this case with those in Budinich, Respondents argue that the ARMC Defendants' counterclaim for attorney's fees arose from an alleged breach of contract, and thus, the amount of the fees yet to be decided is purportedly part of the merits of the case. Br. in Opp'n at 7. However, the counterclaim does not allege a breach of contract, but rather asserts entitlement to attorney's fees and costs incurred in defending against Petitioners' claims **in this litigation** pursuant to a prevailing party fee-shifting provision in a document entitled "Applicant's Consent and Release" ("ACR") (Pet. App. F) executed by Dr. Adeduntan in connection with his appointments to the medical staff at Athens Regional Medical Center. The trial court has already decided the

liability for such fees and costs, leaving only the determination of the amount. Contrary to Respondents' argument, the ACR does not contain an agreement not to sue. The provision upon which the ARMC Defendants rely in support of their counterclaim provides:

> If, notwithstanding the provisions in this Section D, I institute legal action against the Hospital and/or its Medical Staff and do not prevail, I agree to reimburse the Hospital and any Medical Staff members named in the action for any and all costs incurred in defending such legal action, including reasonable attorney's fees.

Pet. App. F, 9-10. The ACR provides that the foregoing was only in effect while Dr. Adeduntan was on staff, and he filed this suit after he was no longer on staff. Id. at 5. Moreover, this Court in Budinich stated in part:

> . . . what is of importance here is not preservation of conceptual consistency in the status of a particular fee authorization as 'merits' or 'nonmerits,' but rather preservation of operational consistency and predictability in the overall application of § 1291. This requires, we think, a uniform rule that an unresolved issue of attorney's fees for the litigation in question does not prevent judgment on the merits from being final.

Budinich, 486 U.S. at 202.

Respondents argue the Eleventh Circuit's

opinion in this case is unpublished and will have no significant impact on future cases. Because the Eleventh Circuit's opinion is unpublished, courts, litigants and their counsel remain without clear guidance as to when their judgment is final.[1] Absent clarification, lawyers will continue to file notices of appeal and request costs as prophylactic measures given the current uncertainty.

If a bright-line rule was intended by Budinich, then that line must not be gray. This case presents the Court with the unique opportunity to clarify Budinich, and rule whether "a decision on the merits is a 'final decision' for purposes of § 1291 whether or not there remains for adjudication a request for attorney's fees attributable to the case," Budinich, 486 U.S. at 202-203, whether arising from statute, law, or contract.

Respondents cite cases for the proposition that the controlling factor in whether an order is a "final decision" is the subjective intent of the trial court. Br. in Opp'n at 8-13. An order disposing of the merits and leaving only the ministerial act of determining the amount of attorney's fees under a contractual prevailing party clause reflects a clear and unequivocal

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[1] As evidence of the uncertainty faced by litigants, the AVS Defendants filed a Bill of Costs fourteen days after the trial court vacated its alleged inadvertently entered judgment. Because the AVS Defendants cannot request costs until entry of a final judgment, the AVS Defendants effectively acknowledged the finality of the trial court's September 21, 2006 order.

manifestation by the trial court that the case is over.

Diaz-Reyes v. Fuentes-Ortiz, 471 F.3d 299 (1st Cir. 2006) involved Title VII individual and official capacity claims. The trial court's order dismissed the claims to the extent they asserted individual capacity claims, but failed to mention the official capacity claims, and defendants never sought dismissal of the official capacity claims. Id. at 301. The appellate court determined *sua sponte* that it lacked jurisdiction under § 1291 since the official capacity claims remained pending and the trial court had not intended to completely resolve all pending claims. Id.

Fiataruolo v. United States, 8 F.3d 930 (2d Cir. 1993) was a suit brought by taxpayers seeking a refund of penalties assessed by the IRS. The jury found for the taxpayers, the trial court entered judgments for the taxpayers, but omitted the amount of the monetary awards. Id. at 936. The appellate court concluded the lack of reference to a specific amount of money alone will not render a judgment non-final. Id. at 937. After concluding jurisdiction under §1291 existed, the court affirmed the judgment and remanded the case to "complete the ministerial task of calculating the dollar amounts of the awards." Id. at 942. Fiataruolo supports a finding that the lack of a determination by the trial court as to the amount of attorney's fees purportedly due the under the ACR does not render the trial court's order disposing of the merits of the case non-final.

In Reinholdson v. State, 346 F.3d 847 (8th

Cir. 2003), nine disabled students sued for violations of the Individuals with Disabilities Education Act. The trial court dismissed all claims, but expressly denied the school district defendant's motion to dismiss plaintiffs' administratively exhausted claims. Id. at 849. The ambiguity created as to the finality of the order was the fact that the trial court entered an order severing the exhausted claims of the nine-named plaintiffs and directing them to refile those claims in separate actions. Id. The appellate court determined that the trial court's use of the word "refile" suggested the litigation would continue. Id. at 849-850. The appellate court found that the trial court's memorandum opinion did not clarify that the severance order effectuated a Rule 21 severance of those claims, and otherwise dismiss all other claims, so that the appellate court only had jurisdiction to construe the severance order. Id. at 850.

In Vaughn v. Mobil Oil Exploration & Producing Southeast, Inc., 891 F.2d 1195 (5th Cir. 1990), the appellate court found the judgment handed down by the trial court was final, even though it did not address the cross-claim of the defendant. The appellate court determined the language of the trial court's judgment was specific and heavy with conclusion, and nothing in the trial court's disposition suggested the judgment was incomplete. Id. at 1197. The trial court closed the case, and the clerk entered judgment. Id. Nine months later, defendant "reurged its long-abandoned cross-claim" by filing a motion to set aside judgment

pursuant to Rule 60(b) of the Federal Rules of Civil Procedure. Id. at 1198. The court stated that even when it was contrary to defendant's interests, defendant treated the earlier judgment as final. The AVS Defendants in the instant matter filed their Bill of Costs after the trial court had vacated its allegedly premature judgment, which demonstrates that even they thought the trial court's order was final.

In an unpublished decision, the appellate court in Russell v. Watkins Ludlam Winter & Stennis, P.A., 181 Fed. Appx. 441 (5th Cir. 2006) concluded it lacked jurisdiction to hear the appeal from a dismissal without prejudice because the defendant raised the issue that the trial court did not set forth the judgment on a separate document in accordance with Federal Rule of Civil Procedure 58, and the trial court's order did not end the litigation on the merits. Here, the trial court's September 21, 2006 Order resulted in the disposition on the merits of all pending claims then asserted.

In the unpublished decision cited by Respondents, Korenica v. SSA, 207 Fed. Appx. 888 (9th Cir. 2006), plaintiff appealed the trial court's denial of cross-motions for summary judgment. The appellate court concluded that it was without appellate jurisdiction because "[w]ith limited exceptions, the denial of summary judgment is a non-appealable, non-final order." Id. at 889.

The case of Warren v. Am. Bankers Ins., 507 F.3d 1239 (10th Cir. 2007) cited by

Respondents does not even address the issue of whether a trial court's order is a final decision for purposes § 1291.

Respondents cite the case of Harbor Ins. Co. v. Trammell Crow Co., 854 F.2d 94 (5th Cir. 1988) for the proposition that a trial court has the discretion to treat a summary judgment order as interlocutory. The Fifth Circuit in Treuter v. Kaufman County, Texas, 864 F.2d 1139 (5th Cir. 1989) explained its earlier decision in Harbor Ins. Co. and stated that it had carved out an exception to the "*Budinich* rule of appealability of decisions by a district court where the district court has not yet determined the specific amount of attorney's fees and expenses to be awarded." Id. at 1143. The Fifth Circuit explained its conclusion in Harbor Ins. Co. stating:

> . . . regardless of whether a request for attorney's fees remains for adjudication, where the district court's judgment on the merits is labeled 'interlocutory' and the district court specifically provides in the judgment that the judgment is an interlocutory judgment only, the time for filing a notice of appeal does not commence until the district court renders a final judgment resolving the attorney's fees issue.

Treuter v. Kaufman County, Texas, 864 F.2d at 1143. Harbor Ins. Co. presented unique facts where the trial court specifically labeled its judgment as "interlocutory." Notwithstanding the exception created by the Fifth Circuit in Harbor

Ins. Co. due to the unique facts, the Fifth Circuit continues to follow Budinich. The orders entered by the trial court in this case contain no similar designations.

Respondents next argue that because the AVS Defendants filed a Motion for Leave to File an Amended Answer and Counterclaim, which the trial court has not ruled upon, substantive issues remain and prevent the summary judgment order from being a final decision. Respondents fail to advise the Court that the subject motion was untimely. In the trial court's initial Joint Scheduling/Discovery Order of October 19, 2004, the court stated all amendments to the pleadings must be made thirty (30) days prior to the end of discovery. See Reply App. A-2. The discovery cutoff was originally set for February 28, 2005, but the court later amended the deadline and set the date for March 31, 2006. Id. at 3; See also Reply App. B-2. The AVS Defendants failed to timely file their motion one month prior to the end of discovery pursuant to the orders of the court, and waited until October 13, 2006, after the close of discovery and after the trial court had disposed of all substantive issues in this case. The trial court likewise denied Petitioners' motion to conduct additional discovery beyond the single peer review at issue, and granted summary judgment against Petitioners on the existing record on all pending claims.[2] Pet. App. C. The Eleventh

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[2] After this case was briefed in the Eleventh Circuit, it decided Adkins v. Christie, et al., Case No. 06-13107 (11th Cir. June 12, 2007), finding the trial court erred by limiting

Circuit has held that prejudice and undue delay are inherent in an amendment asserted after the close of discovery and after dispositive motions have been filed, briefed, and decided. Pines Props. v. Am. Marine Bank, 156 Fed. Appx. 237, 241 (11th Cir. 2005); Campbell v. Emory Clinic, 166 F.3d 1157, 1162 (11th Cir. 1999); Jameson v. Arrow Co., 75 F.3d 1528, 1534 (11th Cir. 1996).

Respondents argue the need for the trial court to show some clear and unequivocal manifestation that its decision is final. The fact that the court has never ruled upon the AVS Defendants' leave motion manifests the court's intent that its summary judgment order disposing of the merits was a final decision. The trial court denied Petitioners' Motion for Reconsideration the same day it was filed. The AVS Defendants submitted a Bill of Costs, even after the trial court vacated an allegedly premature judgment, evidencing the AVS Defendants' belief that the summary judgment order was a final decision.

Respondents also cite the Fourth Circuit's holding in Carolina Power and Light Company v. Dynegy Marketing and Trade, 415 F.3d 354 (4th Cir. 2005) and the Eighth Circuit's decision in Maristuen v. National States Ins. Co., 57 F.3d 673

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production to peer review documents of surgical department physicians during a five-year period, rather than documents covering all physicians on staff during the seven years requested by plaintiff. Here, the trial court manifested its intent to resolve all claims then pending on the record without further discovery beyond the AAA surgery aspect of one peer review, prohibiting discovery on other ARMC peer reviews of Adeduntan.

(8th Cir. 1995). Carolina Power presents a divided legal analysis of the "final decision" issue as to a pending determination of attorney's fees. The primary opinion declines to follow Budinich in the context of a contract-based claim for attorney's fees, based upon the 1993 amendments to Federal Rules of Civil Procedure 54 and 58. In contrast, the concurring opinion notes that:

> . . . as inferior federal judges, we are hardly free to disregard [Budinich] . . . . [N]ever allowing an immediate appeal could actually lead to wasteful litigation depending on the nature of the contractual provision. If the appellate court reverses the district court's determination as to who prevailed, the district court's attorneys' fees determination becomes unnecessary (if the contractual provision provided for fee shifting in more than one direction) or will have to be repeated (if the contractual provision provided for fee shifting in either direction) . . . .

Carolina Power and Light Company, 415 F.3d at 363.

Maristuen presented another unique factual scenario. The plaintiff insured filed suit against the defendant alleging breach of contract of insurance and of the covenants of good faith and fair dealing implied in every insurance contract under North Dakota law. Id. at 675. In addition to contract and bad faith damages, the plaintiff sought punitive damages, exemplary damages,

and damages under federal and state RICO statutes. Id. In the first stage of trial, the jury awarded plaintiff contract damages plus prejudgment interest. Id. The jury also found that the defendant had breached its duty of good faith and awarded bad faith damages in the form of litigation expenses. Id. The jury set the amount of litigation expenses but did not quantify the attorney fees because the parties had agreed that the amount of attorney fees would be set by the court. Id. In the second stage, the jury awarded plaintiff punitive damages, and the trial court subsequently entered judgment on these verdicts. Id. The trial court later quantified the amount of fees as per the agreement of the parties and amended the judgment. Id. Defendant appealed, and plaintiff sought dismissal of the appeal as untimely, arguing that the earlier judgment was final and started the clock on filing the notice of appeal. The appellate court in Maristuen distinguished the case from Budinich stating "[t]his case differs from *Budinich* and the other cases cited above because the award of unquantified attorney fees here **is set out in and is an integral part of the judgment** entered by the District Court in accordance with the jury's verdicts." Id. at 677 (emphasis added).

The Eleventh Circuit seemingly seeks guidance in this matter stating: "For better or for worse, whether wrong or right, MedPartners is binding panel precedent that we must follow until this Court sitting en banc, or the Supreme Court, decides otherwise in a case that presents the contract-attorney's fees issue. [internal citation

omitted]." Pet. App. D-8-9.

This is the perfect case for this Court to now clarify the split between circuits as to the application of Budinich.

CONCLUSION

Based upon the foregoing, the Petitioners respectfully request that this Honorable Court grant the Petition for Writ of Certiorari.

Respectfully submitted,

LAWRENCE E. NEWLIN
Counsel of Record
JEFFREY N. SCHWARTZ
Counsel for Petitioners
LAWRENCE E. NEWLIN & ASSOCIATES, P.C.
2394 Mt. Vernon Road
Suite 220
Atlanta, Georgia 30338
(678) 587-9000

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ATHENS DIVISION

AZEEZ P. ADEDUNTAN,
VICTORY VASCULAR & GENERAL
SURGERY OF GEORGIA, P.C.

Plaintiffs,

vs. CASE NO. 3:04-CV-65 (CDL)

HOSPITAL AUTHORITY OF CLARKE
COUNTY d/b/a ATHENS REGIONAL
MEDICAL CENTER, et al.,

Defendants.

JOINT PROPOSED
SCHEDULING/DISCOVERY ORDER

Pursuant to Federal Rule of Civil Procedure 26(f), a conference was held on October 5, 2004, between Michael Terry, counsel for Hospital Authority of Clark County d/b/a Athens Regional Medical Center, Athens Regional Medical Center, Inc. and Athens Regional Health Services, Inc., Benton J. Mathis, Jr. and Gary Blasingame, counsel for Athens Vascular Surgery, P.C., David M. Sailors, M.D., and Mark J. Costantino, M.D. and Lawrence Newlin, counsel for Plaintiffs. In accordance with Federal Rules of Civil

Procedure 16(b) and 26(f), and this Court's Rules 16 and 26 Order of September 3, 2004, the parties hereby submit their joint consolidated report and proposed scheduling and discovery order.

I. SCHEDULING

(a) Joinder and Amendments.

At this time, the parties do not anticipate joinder of additional parties or amendment of the pleadings. Should discovery reveal that Plaintiffs have claims against additional parties, Plaintiffs will promptly act to add those parties to this case. Should discovery reveal that Defendants have any additional affirmative defenses, Defendants will promptly add those defenses to this case. The parties agree that absent good cause, joinder and amendments shall be made at least one month prior to the end of discovery.

(b) Filing/Hearing of Motions.

Motions to Compel, if necessary, may be filed at any time up to and including the date on which the discovery period expires unless it is not reasonably possible to do so. The parties agree that all potentially dispositive motions, including summary judgment motions, will be filed within forty-five (45) days after the completion of the discovery period. Motions for summary judgment are due to be filed no later than April 14, 2005. Motions shall be no longer than 30 pages unless ordered by the Court. Respondent has 20 days and 30 pages to respond to the dispositive motion and Movant

shall have 10 days thereafter and no more than 15 pages to file a reply.

(c) Completion of Discovery.

Plaintiffs filed their Complaint on July 1, 2004. Defendants filed their Answers on August 30, 2004, and September 1, 2004, respectively. Thus, pursuant to this Court's Rules 16 and 26 Order, discovery will be completed six (6) months after that date, specifically, February 28, 2005. Further, the parties agree to discuss requesting an extension of time for discovery if, despite exercising due diligence, they have been unable to complete discovery in time.

II. DISCOVERY

(a) Proposed Plan of Discovery.

In accordance with Local Rules 33.1, 34 and 36, a maximum of 25 interrogatories, 10 requests for production of documents, and 15 requests for admissions will be served by each party on another party. Plaintiffs currently anticipate that they will need to exceed the limitation on document production requests. The parties agree to consider moving for an extension of the number of interrogatories, requests for production of documents, and requests for admissions, if either party shows a need for such an extension.

(b) Witnesses to be Deposed.

At this time, Counsel for the respective Defendants anticipate that they will depose the following individual(s):

(1) Plaintiff, Azeez P. Adeduntan -

January 10, 2004

(2) Dr. Herbert Dardik - January 13, 2004

(3) Frank J. Vittimberga, M.D. - January 14, 2004

-Associated Surgeons, P.C., 300 Mount Auburn Street, Suite 407, Cambridge, MA 02138

At this time, Counsel for Plaintiffs anticipates that he will depose the following individual(s):

(1) Dr. Patricia Burgess - 1199 Prince Ave., Athens, GA 30606 - 2 hours

(2) Dr. Steven Bramlet - 154 Melbourne Dr. Athens, GA 30606 - 2 hours

(3) Dr. Mauro Faibicher - 1364 Clifton Rd., Atlanta, GA 30322 - 2 hours

(4) Dr. Cecil Hudson - 2260 Simonton Bridge Rd., Watkinsville, GA 30677 - 7 hours

(5) Dr. Chris E. Malone - 195 King Ave., Athens, GA 30606 - 7 hours

(6) Dr. E.W. Cody Gunn, III - 1270 Prince Ave., Suite 102, Athens, GA 30606 - 7 hours

(7) Dr. David M. Sailors - 195 King Ave., Athens, GA 30606 - 7 hours

(8) Dr. Mark J. Costantino - 195 King Ave., Athens, GA 30606 - 7 hours

(9) Heather Pray - 1199 Prince Ave., Athens, GA 30606 - 1 hour

(10) Heather Haley - 77 Harry Pauls Rd., Danielsville, GA 30633 - 3 hours

(11) Shirley Whitfield - 1329 Garnett Ward Road, Hull, GA 30646 - (706) 353-6806 - 2 hours

(12) Dr. Herbert Dardik - 375 Engle St., Englewood, NJ 07631 - (201) 894-0400 - 5 hours

(13) Dr. Wayne F. Middendorf - 489 N. Milledge Ave., Athens, GA 30601 - 2 hours

(14) Rebecka Ramming - 1940 Bold Springs Rd., NW, Monroe, GA 30656 - (770) 267-7194 - 1 hour

(15) Mildred Gunter - 251 Wilson Dr., Commerce, GA 30529 - (706) 335-4762 - 1 hour

(16) Kristian Walker - 431 Hightower Trail, Jefferson, GA 30549 - (706) 367-4556 - 1 hour

(17) Dr. Fayette M. McElhannon, Jr. - (706) 548-1386 - 1 hour

(18) Dr. D. Hamilton Magill, III - (706) 546-8510 - 3 hours

(19) Representative(s) from St. Mary's Hospital - 7 hours

(20) Dr. Willy E. Zuniga - (706) 795-3301 - 4 hours

(21) Catherine Cole - (706) 543-3264 - 1 hour

(22) Dr. James S. Miller - (706) 546-8510

- 3 hours

(23) Dr. Harvey G. Ouzts - (706) 546-8510 - 2 hours

(24) Sylvia Cooper - (706) 742-5716 - 1 hour

(25) Dr. Thomas J. Murphy - (706) 546-8510 - 1 hour

(26) Frances Atkinson - (706) 546-6545 - 1 hour

(27) Ellis Crawford - (706) 769-6383 - 1 hour

(28) Dr. Susan K. Kreher - (706) 543-8444 - 3 hours

(29) Dr. Gautam Dasgupta - (706) 546-0083 - 4 hours

(30) Dr. Antonio T. DaCunha - (706) 369-5084 - 3 hours

(31) Dr. O. Thompson Cassity, Jr. - (706) 475-3694 - 2 hours

(32) John A. Drew - 1199 Prince Ave., Athens, GA 30606 - 7 hours

Pursuant to Fed. R. Civ. P. 26(b)(2), Defendants object to Plaintiffs' existing intention to take 32 depositions and respectfully request that the Court limit Plaintiffs to 10 depositions. In this regard, Defendants show that a review of the requested depositions reflects that Plaintiffs are seeking to depose individuals that: (1) are not likely to have any knowledge relevant to a claim or defense in this matter; or (2) would

provide unreasonably cumulative and deposition testimony. Additionally, Defendants submit that the information sought from the depositions of these 32 deponents can be obtained from some other less burdensome and less expensive source. Defendants agree that Plaintiffs can petition the Court after completion of the initial 10 depositions if they demonstrate a reasonable and legitimate need for sworn testimony from additional individuals. Defendants show that, after the Court issues its Order regarding the number of depositions Plaintiffs can take, the parties will confer in good-faith to schedule Plaintiffs' allowable depositions.

The parties acknowledge that the date, time and location of the above depositions may change based upon scheduling conflicts that may develop. The parties agree to cooperate in rescheduling any depositions and to provide prompt notice of the new date, time and location of the deposition. The parties also acknowledge that they may schedule additional depositions after conducting discovery in this case.

(c) Initial Disclosures.

The parties are required to serve initial disclosures in accordance with Fed. R. Civ. P. 26(a)(1). The parties agree that they will serve their Fed. R. Civ. P. 26(a)(1) disclosures by

October 19, 2004.

(d) Expert Testimony.

Any party who desires to use the testimony of an expert witness will be required to designate the expert according to the following schedule, so that the expert will be identified sufficiently early in the discover period to give the opposing party the opportunity to depose the expert. If Plaintiffs desire to use the testimony of an expert, they must disclose the identity of the expert within 90 days after the filing of the last answer of the Defendants named in the original complaint (November 30, 2004). If Defendants desire to use the testimony of an expert, they must disclose the identity of the expert within 120 days after the filing of the last answer of the Defendants named in the original complaint (December 30, 2004). In the event Defendants designate an expert where Plaintiffs have not previously designated an expert, Plaintiffs shall have an additional 30 days to designate a rebuttal expert. Any disclosure of an expert witness must be accompanied by a written report prepared and signed by the expert in accordance with the requirements of Fed. R. Civ. P. 26(a)(2)(B).

(e) Estimated Cost.

It is early in the litigation, but Counsel for Defendants Athens Vascular Surgery, P.C., Dr. Sailors and Dr. Costantino estimate that their discovery costs will be approximately $75,000. Counsel for the Hospital Authority of

Clark County d/b/a Athens Regional Medical Center, Athens Regional Medical Center, Inc. and Athens Regional Health Services, Inc. estimate that their discovery costs will be approximately $80,000. Counsel for Plaintiffs estimates that discovery will cost approximately $50,000.00.

III. ADDITIONAL INFORMATION

(a) Lead Counsel Designation.

For Plaintiffs:

Lawrence E. Newlin
Lawrence E. Newlin & Associates, P.C.
2408 Mt. Vernon Road
Suite 200
Atlanta, GA 30338
T: 678.587.9000

For Defendants Athens Vascular Surgery, P.C., David M. Sailors, M.D., and Mark J. Costantino, M.D.:

Benton J. Mathis, Jr.
Bradley T. Adler
Freeman, Mathis & Gary, LLP
100 Galleria Parkway
Suite 1600
Atlanta, GA 30339-5948
T: 770.818.0000

J. Ralph Beaird
Gary B. Blasingame
Blasingame, Burch, Garrard, Bryant &

Ashley, P.C.
P.O. Box 832
Athens, GA 30603
T: 706.354.4000

For Defendants Hospital Authority of Clark County d/b/a Athens Regional Medical Center, Athens Regional Medical Center, Inc. And Athens Regional Health Services, Inc.:

Emmet J. Bondurant, II
Michael B. Terry
Bondurant, Mixson & Elmore, LLP
3900 One Atlantic Center
1201 W. Peachtree Street NW
Atlanta, GA 30309-3417
T: 404.881.4100

Roy E. Manoll, III
J. Edward Allen
Fortson, Bentley & Griffin, P.A.
P.O. Box 1744
Athens, GA 30603-1744
T: 706.548.1151

(b) The parties REQUEST a scheduling conference in this matter to discuss the Plaintiffs' intention to conduct thirty-two (32) depositions and Defendants' objections to the propriety of those depositions. The Court grants the parties' request for a scheduling conference to resolve the issue of the number of depositions that each party will

be allowed to take without leave of court. The parties will be contacted by the Court's courtroom deputy clerk to schedule the conference.

SO ORDERED this 19th day of October, 2004.

S/Clay D. Land
CLAY D. LAND
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ATHENS DIVISION

AZEEZ P. ADEDUNTAN,
VICTORY VASCULAR & GENERAL
SURGERY OF GEORGIA, P.C.

Plaintiffs,

vs. CASE NO. 3:04-CV-65 (CDL)

HOSPITAL AUTHORITY OF CLARKE
COUNTY d/b/a ATHENS REGIONAL
MEDICAL CENTER, et al.,

Defendants.

ORDER

Plaintiffs move the Court to amend the scheduling order to allow Plaintiffs additional time to identify expert witnesses if necessary. The present discovery period is scheduled to expire on February 28, 2006 with dispositive motions due on April 14, 2006. Plaintiffs maintain that due to scheduling conflicts beyond their control, they need additional time to identify expert witnesses. Defendants do not object to providing Plaintiffs with additional time to identify experts as long as it does not extend the discovery period and result in an extension of the dispositive motion deadline.

Having reviewed Plaintiffs' motion and Defendants' response, the Court finds that some extension of the discovery period is warranted. The Court therefore extends the discovery period to March 31, 2006. Plaintiffs shall identify any experts on or before March 17, 2006 and shall make any such experts available for deposition prior to March 31, 2006. Defendants shall have until April 14, 2006 to identify their experts. If Defendants identify no experts, dispositive motions shall be filed on or before April 28, 2006. If Defendants identify an expert, the discovery period shall be extended through April 28, 2006 to permit Plaintiffs to depose Defendants' expert, and dispositive motions shall be due on or before May 12, 2006.

The existing scheduling order shall be amended as set forth hereinabove.

IT IS SO ORDERED, this 15th day of February, 2006.

S/Clay D. Land
CLAY D. LAND
UNITED STATES DISTRICT JUDGE